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IN THE
SUPREME COURT OF THE UNITED STATES

ARIADNA PUERTO,
*Petitioner*,

v.

UNITED STATES OF AMERICA,
*Respondent*.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

# PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED FOR REVIEW

This case presents an issue of first impression: Whether a co-defendant's confrontation rights can trump a defendant's right to present a defense, leading the district court to exclude exculpatory evidence and to deny a severance.

## INTERESTED PARTIES

There are no interested parties other than those listed in the caption of the case.

## TABLE OF CONTENTS

QUESTION PRESENTED FOR REVIEW ..... i

INTERESTED PARTIES ..... ii

TABLE OF AUTHORITIES ..... iv

PETITION ..... 1

OPINION BELOW ..... 1

STATEMENT OF JURISDICTION ..... 1

STATUTORY PROVISION INVOLVED ..... 2

STATEMENT OF THE CASE ..... 4

REASONS FOR GRANTING THE WRIT ..... 24

CONCLUSION ..... 40

APPENDIX

Decision of the Court of Appeals for the Eleventh Circuit, *United States v. Ariadna Puerto*, 2010 WL 3191765 (11th Cir. 2010) ..... App. 1

Judgment Imposing Sentence ..... App. 48

## TABLE OF AUTHORITIES

Page

**CASES:**

*Braswell v. Wainwright*
463 F.2d 1148 (5th Cir. 1972) . . . . . 25

*Byrd v. Wainwright*
428 F.2d 1017 (5th Cir.1970) . . . . . 27,28,33

*Bruton v. United States*
391 U.S. 123 (1968) . . . . . 27,28,33

*Chambers v. Mississippi*
410 U.S. 284 (1973) . . . . . 25

*Crawford v. Washington*
541 U.S. 36 (2004) . . . . . 17,38

*Kotteakos v. United States*
328 U.S. 750 (1946) . . . . . 26

*Schaffer v. United States*
362 U.S. 511 (1960) . . . . . 27

*Tifford v. Wainwright*
588 F.2d 954 (5th Cir. 1979) . . . . . 26,29

*United States v. Anderson*
872 F.2d 1508 (11th Cir.1989) . . . . . 38

*United States v. Cohen*
888 F.2d 770 (11th Cir. 1989) . . . . . 38

*United States v. Davis*
639 F.2d 239 (5th Cir. Unit B 1981) . . . . . 28

*United States v. DiBernardo*
880 F.2d 1216 (11th Cir. 1989) . . . . . 27,28,33

*United States v. Echeles*
352 F.2d 892 (7th Cir. 1965) . . . . . 34

*United States v. Ethridge*
948 F.2d 1215 (11th Cir. 1991) . . . . . 38

*United States v. Johnson*
478 F.2d 1129 (5th Cir. 1973) . . . . . 27

*United States v. Pepe*
747 F.2d 632 (11th Cir.1984) . . . . . 27

*United States v. Ramirez-Lopez*
315 F.3d 1143 (9th Cir. 2003) . . . . . 36,37

*United States v. Riley*
550 F.2d 233 (5th Cir. 1977) . . . . . 38

*United States v. Rodriguez*
218 F.3d 1243 (11th Cir. 2000) . . . . . 36,37

*United States v. Todd*
108 F.3d 1329 (11th Cir. 1997) . . . . . 38

*United States v. Veltmann*
6 F.3d 1483 (11th Cir. 1993) . . . . . 38

*United States v. Zafiro*
506 U.S. 534 (1993) . . . . . 4,25

*Washington v. Texas*
388 U.S. 14 (1967) . . . . . 25,38

**STATUTORY AND OTHER AUTHORITY:**

Fed.R.Cr.P.14 . . . . . 4, 25

Fifth Amendment . . . . . 18,28,39

Sixth Amendment . . . . . 18,28,37,39

Supreme Court Rules . . . . . 1

## PETITION FOR WRIT OF CERTIORARI

Ariadna Puerto respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in *United States v. Ariadna Puerto*, 2010 WL 3191765 (11th Cir. 2010).

## OPINION BELOW

A copy of the decision of the United States Court of Appeals for the Eleventh Circuit, which affirmed the judgment of the United States District Court for the Southern District of Florida, is contained in the Appendix (App. 1).

## STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and PART III of the RULES OF THE SUPREME COURT OF THE UNITED STATES. This petition is timely filed pursuant to SUP. CT. R. 13.1 and 13.3.

## STATUTORY PROVISION INVOLVED

Petitioner intends to rely upon the following constitutional provisions, treaties, statutes, rules, ordinances and regulations:

**U.S. Const. Amend V:**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

**U.S. Const. Amend VI:**

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

**Rule 14, Federal Rules of Criminal Procedure:**

(a) Relief. If the joinder of offenses ... in an indictment, an information, or a consolidation for trial appears to prejudice a defendant or the government, the court may order separate trials of counts, sever the defendants' trials, or provide any other relief that justice requires.

## STATEMENT OF THE CASE

### A. INTRODUCTION

This Court held in *Zafiro v. United States*, 506 U.S. 534, 539 (1993), that a district court should grant a severance under Federal Rule of Criminal Procedure 14 where "there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." Identifying one particular situation in which severance should be ordered, this Court stated: "a defendant might suffer prejudice if essential exculpatory evidence that would be available to a defendant tried alone were unavailable in a joint trial." *Id.* at 539.

This case presents exactly that scenario. Unfortunately, however, the district court refused to sever, preventing the jury from ever hearing essential exculpatory evidence.

Petitioner Ariadna Puerto was joined in a bank fraud indictment with three other co-defendants. The Government's theory was that the defendants, all of whom worked for a factoring company – i.e., a business that purchased the accounts receivable of other businesses – engaged in so-called "cycling" of funds, a process by which phony invoices were created, deliberate overpayments were made, and substantial funds were siphoned off. Mrs. Puerto, an assistant to one of the principals of the factoring company, readily admitted that she followed her superiors' instructions

that she sign certain company checks and review certain documents and invoices. Her defense was straightforward: she had no idea the company's activities were fraudulent and unlawful, and she therefore lacked the requisite specific intent.

To help establish her defense, Mrs. Puerto sought to call two critical witnesses who had also worked for the factoring company, Joan Strudwick and Lorna Wright. Strudwick and Wright had performed the same basic clerical tasks that Mrs. Puerto had done, and when interviewed by the FBI, they too said they had no idea those tasks were part of a criminal enterprise. Moreover, when Mrs. Puerto came onboard, it was Strudwick who trained Puerto about specifically what to do, and exactly how to do it.

The jury was entitled to hear this testimony, which powerfully indicated that the ministerial tasks Mrs. Puerto ultimately handled bore no apparent indicia of unlawfulness, and that no one had ever informed Mrs. Puerto about the unlawful nature of the enterprise she was unwittingly supporting. Mrs. Puerto was constitutionally entitled to present this key evidence in her defense.

However, due to the joint nature of the prosecution, Mrs. Puerto was prevented from doing so. First, Strudwick and Wright refused to answer any questions, each asserting Fifth Amendment rights against self-incrimination. Because Struckwick and Wright had rendered themselves effectively unavailable, Mrs. Puerto's only method of having the

jury hear their exculpatory statements was to introduce the statements the two women had previously given to the FBI and which were recorded in formal FBI "302" reports, or alternatively to have the FBI agents testify as to what Strudwick and Wright had reported. The district court found that these statements were admissible and acknowledged their exculpatory nature.

But the jury never got to hear them – for the sole reason that Mrs. Puerto was being tried jointly with other co-defendants, instead of separately. Mrs. Puerto's co-defendants each objected to their admission, arguing (reasonably) that this testimonial evidence was not subject to cross-examination and its introduction would thus run afoul of their Sixth Amendment rights under the confrontation clause. At that point, Mrs. Puerto's Sixth Amendment right to compulsory process and her Fifth Amendment right to due process had come squarely in conflict with her co-defendants' Sixth Amendment confrontation clause rights. This conflict between the rights of the various co-defendants should have come as no surprise to the district court. At numerous times throughout the four-month trial, various co-defendants had moved to sever the case, or otherwise to bifurcate the trial so the jury would not have to consider all the of the defendants' evidence simultaneously. Each severance and bifurcation request was denied.

Whatever the propriety of those previous denials of severance or bifurcation, when the Studwick and Wright evidentiary conundrum developed, severance

was absolutely required. Indeed, the precise scenario presaged by this Court in *Zafiro*, 506 U.S at 539 – "a defendant . . . suffer[ing] prejudice [because] essential exculpatory evidence that would be available to a defendant tried alone [was rendered] unavailable in a joint trial" – had unfortunately arisen.

The district court acknowledged that if Mrs. Puerto had been tried separately, the jury would have heard this exculpatory evidence. However, solely because the Government had elected to try the co-defendants jointly and the district court refused to sever the case when the problem presented itself. Accordingly, Mrs. Puerto was denied the ability to present powerful exculpatory witnesses.

The evidence excluded was ruled admissible and was clearly and forcefully corroborative of Mrs. Puerto's defense and therefore critical. The excluded evidence provided crucial corroboration of Mrs. Puerto's defense and made it entirely more plausible that she was kept in the dark. There was no other evidence available to establish that one could perform Mrs. Puerto's job and yet fail to appreciate that crimes were being committed. Thus, there was no other evidence that could put Mrs. Puerto's defense in its proper, plausible light before the jury. The failure to sever so that the jury could receive the evidence infringed on Mrs. Puerto's fundamental right to present a defense. *See Chambers v. Mississippi*, 410 U.S. 284, 294 (1973) ("The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's

accusations."); *Washington v. Texas*, 388 U.S. 14, 19 (1967) ("Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense.")

Even though the district court unequivocally ruled that the statements were both admissible and relevant to Mrs. Puerto's defense, it refused to sever Mrs. Puerto's trial and excluded the statements to ensure that *other* defendants had a fair trial. The Eleventh Circuit affirmed.

## B. THE CHARGES AGAINST MRS. PUERTO

The indictment against Mrs. Puerto charged her with 32 of the 58 offenses charged. She was charged with one count of conspiracy to commit bank and wire fraud (count 1), twenty one counts of bank fraud (counts 5-25), four counts of wire fraud (counts 31, 32, 37 & 38), one count of conspiracy to commit money laundering (count 40) and five counts of money laundering (counts 41, 42, 44, 45 & 58).

The Government's theory of the case was that ES Bankest, the factoring company for which all the Defendants worked, was essentially operating a so-called "Ponzi scheme" whereby the company used new investors' money to pay off old investors. Tr. 4-765.[1]

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1/ References to the Trial Transcript will be in this format: Tr. [day number] - [page number]. References to the Record will be in this format: R-[docket entry number]-[page number].

The term frequently used at trial to describe the process by which the alleged fraud was accomplished was a "cycling" of funds.

Mrs. Puerto never contended that all actions by ES Bankest employees were legal – she simply didn't know. Although the Government effectively conceded that Mrs. Puerto never pocketed even a nickel from the company's assertedly illegal acts, the Government's theory was that she knew about the company's fraudulent scheme and knowingly participated in it because her interest was "the salary that supported her family" and her "allegiance to her job." Tr. 55-10618. Mrs. Puerto's straightforward defense was that she was an employee, she did the ministerial tasks that her bosses told her to do, and she had no idea of the larger criminal scheme taking place.

### C. THE CRITICAL STATEMENTS FROM WOULD-BE WITNESSES STRUDWICK AND WRIGHT

From the very outset of the trial, both the Government and Mrs. Puerto emphasized the critical nature of two employees of ES Bankest, Joan Strudwick and Lorna Wright. The Government told the jury in its opening statement that Strudwick and Wright were "lower-level employees" at ES Bankest whose job it was to initiate the accounting paperwork so that the company's principals (who would later become Mrs. Puerto's co-defendants) could make the actual business decisions:

> But it was the job of a woman named

> Joan Strudwick, a lower level employee at ES Bankest, who would take that request for money, and she would run a computer printout to show how much money does Joy [Silk Screen Co.] have available to it to get. Well, Joy never had any money available to it. It was always in an overadvance. And she would attach that piece of -- it's called "a reserve account" -- to show how much money is Joy entitled to get, and she would give it to Eduardo Orlansky, Hector Orlansky, or Peter Stanham, because those were the only three people that could sign those checks.

Tr. 4-795-96 (bracketed material added for clarity).

The Government further told the jury that Strudwick and Wright were the first to uncover some curious accounting practices with the company, and the Government further asserted that they brought this to the attention of Mrs. Puerto:

> And some of the lower-level employees, this woman Joan Strudwick, who I mentioned, and her sister, Lorna Wright, they got awfully suspicious about this account. Because it showed $11 million actually over, $11 million of accounts receivables they had purchased from CD JewelBox. In other words, Sony, MCA, all these companies supposedly owed, and

> no money was ever being collected, not a dime. So, Joan Strudwick and her sister, Lorna Wright, ran a computer check on the Internet. They wanted to see, who's this company belong to. Well, it turned out the company belonged to Dominick Parlapiano, the senior vice president. That didn't make any sense. They were factoring a company in which Dominick Parlapiano was the president of? So, they went to the person they trusted. They went to the person that had risen through the ranks over the years. They went to Ariadna Puerto. And they said, you know, this company, this CD JewelBox, one, we haven't collected a dime, and, two, it seems to be in the name of Dominick Parlapiano.

Tr. 4-796-97.

Recognizing the critical nature of Strudwick and Wright's testimony on her defense of lack of criminal intent, Mrs. Puerto's opening statement also highlighted Strudwick and Wright and their job functions:

> They have to make sure that there's enough credit in that customer's account, and then insurance will cover it. There's a company called Euler, or Euler ACI, that ensures the creditworthiness of these invoices. So that's all done right at this

> level here by the operations people at Bankest. Those people, just to give you some idea, would be Joan Strudwick. She's part of the operations department, although this generally is not what she would do. She's more involved in other aspects of the operations department. But there's also her sister, Lorna Wright. Lorna does exactly this right here. She takes care of those invoices, logs them into the AS400, assuming they meet the criteria for Bankest's rules. And then they're refactored, which is also done by the operations people, to ES Bankest.

Tr. 5-999. Mrs. Puerto's counsel assured the jury that they would get to hear from Strudwick herself:

> But in 1999, one of Ariadna's co-workers came to her -- she's the office manager -- and she said -- this co-worker said, you know, this signature on this check we have from CD JewelBox, which I'm depositing, it's my job to deposit -- this is Joan Strudwick. She's in the operations department. She handles incoming money, among other things. *And you'll hear from her. The government will call her as a witness.* Joan said to Ariadna, this signature, it looks funny. It almost looks like Dominick's signature.

Tr. 5-975 (emphasis supplied).

But the jury never did get to hear from Strudwick or Wright. Despite the undisputed fact that Strudwick and Wright had been the ones to train Mrs. Puerto exactly how to complete her job tasks, *see, e.g.*, Tr. 47-9144 – and thus were in unique position to shed light on Mrs. Puerto's likely understanding of the company's larger scheme – the Government never ended up calling them to testify.

Accordingly, during the presentation of her own case, Mrs. Puerto notified the district court that she intended to call Strudwick and Wright to testify. Tr. 49-9317. But the Government insisted – for the first time some seven weeks into the trial – that Strudwick and Wright be advised of their Fifth Amendment rights before testifying, Tr. 49-9318-19, and when so advised, both women invoked the Fifth and refused to answer all questions put to them. Tr. 53-9904-05.

### D. THE DISTRICT COURT'S REFUSAL TO ALLOW THE JURY TO HEAR STRUDWICK AND WRIGHT'S STATEMENT TO THE FBI

The eleventh-hour unavailability of these two key witnesses – whose importance both sides had trumpeted during opening statements – left Mrs. Puerto scrambling, but not without recourse. She filed a motion seeking the permission to introduce the statements Strudwick and Wright had made when interviewed by the FBI, and which were transcribed by FBI agents in so-called "302"reports. R-782.

Strudwick was interviewed twice by the FBI, first in September 2003 and then again in November 2004. *See id.* On both occasions, FBI Special Agent Susan A. Sprengel transcribed Strudwick's statements into formal FBI 302 reports. The September 2003 reports Strudwick as having stated that her role with respect to paying the accounts was essentially ministerial, and that at all times she adhered to the strict instructions of her supervisors. R-782-7-8.

The FBI 302 statement from September 2003 also reported that when some of the numbers struck Strudwick as suspicious, she went to her boss, Eduardo Orlansky, and told him this, but Orlansky satisfied her that the operations were entirely above board. *Id.* at 9.

Approximately a year later, in November 2004, Special Agent Sprengel again interviewed Strudwick and prepared a report of her statements. Id. at 10-13. She again reported the perfunctory nature of her duties, and also those of Mrs. Puerto. *Id.* at 11.

Strudwick repeated her statement that she was ignorant of any criminal scheme and instead just assumed folly on the part of her boss:

> STRUDWICK knew that ORLANSKY was very involved in the running of the factoring business, however, she suspected that he was a bad businessman. She stated that decisions regarding the funding of any client was ultimately approved by ORLANSKY, who

> signed most of the funding checks. Several times she was confused as to why ORLANSKY was funding a company which she knew did not have availability to funding. In 2002, she questioned him when she was directed to prepare a check for STRATASYS, a client of the company E.S. BANKEST. When she asked ORLANSKY why he was providing more funding to a company which never made any payments, ORLANSKY responded, "Believe me, I know what I'm doing."

*Id.* at 12.

When Lorna Wright (who was both Strudwick's co-worker and sister) was interviewed by Special Agent Sprengel, she made essentially the same statements. When interviewed in September 2003, she described her job duties essentially in ministerial terms. *Id.* at 15. Wright also explained that she and other employees were shocked to learn the extent of the fraud committed by the managers of Bankest. *Id.* at 17-18.

In November 2004, during her second interview with Special Agent Sprengel, Wright explained that her accounts receivable duties described above eventually devolved to Mrs. Puerto, as little more than the most recent in a long line of clerical workers:

> VIVIAN MORALES worked at BCC in Accounts Payable and left the company in

> August 1996. WRIGHT took over MORALES' responsibilities when she left. JESSICA ALTURA took over WRIGHT'S Accounts Receivable responsibilities on a part-time basis. Eventually ARIADNA PUERTO took over the Accounts Payable duties and WRIGHT covered PUERTO's duties in her absence.

*Id.* at 19-20.

In short – and as the district court acknowledged – many of the statements made by Strudwick and Wright to the FBI were clearly exculpatory to Mrs. Puerto, in that they demonstrated that Strudwick, Wright and Puerto were all used as pawns, without their knowledge of the larger criminal scheme that was afoot. Arguably other parts of these statements were unfavorable to Strudwick and Wright, in that they at least showed some awareness that there was at least one dishonest person in the company, Carlos Mendez – who turned out to be the Government's star witness.[2]

But the jury was denied the opportunity to hear any of the foregoing statements and make its own determination as to their impact. Having been denied Strudwick and Wright's direct testimony by virtue of their invocation of the Fifth Amendment rights, Mrs. Puerto sought to admit portions of the FBI 302

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2 / For example, Wright reported one instance in which one of her supervisors, Carlos Mendez – but not the Orlanskys – told her to falsify figures on a list of insurance coverage. *Id.* at 15, 17-18.

statements themselves, or at least to call the FBI agents to resolve any double hearsay problem (the initial layer of hearsay being admissible as statements against the declarants' interest). The district court ruled that many of the statements were indeed exculpatory to Mrs. Puerto and admissible, so long as elicited through the testimony of the FBI agent. Tr. 54 -9956-57. The district court's holding that the statements of Ms. Strudwick and Ms. Wright were admissible was well within the district court's discretion. The district judge meticulously thought about the issue:

> I did research on it, I read it yesterday here in chambers, and went through all of these reports page by page and highlighted what I thought might come within the ambit of 804(b)(3), and they are the ones that I mentioned to [the prosecutor], and no others. Tr. 54-9956–57.

However, there was yet another hurdle to introduction of some of Strudwick and Wright's statements – a hurdle created solely by the fact that Mrs. Puerto was being tried jointly with her co-defendants. The co-defendants objected to their admission, asserting that "each and every one of these statements is a *Crawford* violation." Tr. 54-9951, 55-10066. The district court preliminarily sifted through the various statements, agreeing that some of them were indeed barred by *Crawford v. Washington,* 541 U.S. 36 (2004), and others were not. *See* Tr. 54-9958-

61.

After the proceedings adjourned for the evening, the district court reversed course and decided to exclude all of the statements under *Crawford*. In doing so, the district court stated that it was excluding "those statements made by Ms. Strudwick and Ms. Wright that *would otherwise be admissible as statements against penal interest under Rule 804(b)(3).*"

## E. MRS. PUERTO'S MOTION FOR SEVERANCE AND MISTRIAL

Upon receiving the district court's ruling excluding all of Strudwick and Wright's statements, Mrs. Puerto immediately moved for a severance, stating: "As the Court has recognized, this material is admissible under 804(b)(3), and it does assist me in my defense, I believe rather greatly. And there is a remedy now. That remedy is a severance or bifurcation." Tr. 55-10072. The Government opposed the motion. Tr. 55-10073. Mrs. Puerto then proposed that the statements be admitted along with a limiting instruction to the jury that the statements are "offered only on behalf of Ariadna Puerto" and "must not be considered by you as evidence either regarding or against any of the other defendants." Tr. 55-10079.

But the district court was unmoved and prioritized the co-defendants' Sixth Amendment rights over Ariadna Puerto's Fifth Amendment right to due process and Sixth Amendment right to present a complete defense and denied the motion for severance.

## F. MRS. PUERTO'S CLOSING ARGUMENT AND THE JURY'S VERDICT

The transcript plainly reveals the centrality of Strudwick and Wright's statements to Mrs. Puerto's defense – indeed, those statements *were* her entire defense. Her closing argument left no doubt on this point:

> There is one more very important legal principle that is specific to Ms. Puerto. You're going to get a special instruction from Judge Jordan that deals with Ms. Puerto's defense. Now, it's special to Ms. Puerto, but you're going to get other instructions that are particular to other defendants, but I'm not going to address those. The instruction that you're going to get from Judge Jordan, I submit to you, is very important. It's going to be a guide that is going to help you understand the evidence in the case and properly evaluate it under that reasonable doubt standard. Because the judge has decided to give it to you, I'm going to read it to you right now before explaining it any further. This is what you'll hear, and you'll actually have it back with you in the jury room:
>
> > "In this case, Ariadna Puerto has raised the defense that certain

> acts done by her during the times alleged in the superseding indictment were done innocently, without criminal intent. Ms. Puerto's position is that other persons at Bankest did identical or similar acts at or about the same or similar times as Ms. Puerto. That there is no proof that the other persons did such acts with criminal intent, and that Ms. Puerto may have relied upon such acts by the other persons in believing that her conduct was lawful."

Tr. 61:11107-08.

But the district court's exclusion of Strudwick and Wright's actual statements – an exclusion made on the 55th day of trial – deprived Mrs. Puerto of the only direct evidence that they had acted without any hint of the possible unlawfulness of their conduct or of the company's broader criminal scheme. Instead, Mrs. Puerto was reduced to having to weakly insinuate this point in a most circuitous way:

> But what this instruction does permit you all to do and tell you to analyze – it instructs you, you should analyze the evidence this way – is that you can look at the evidence about other people at Bankest – and I submit to you it will be

> Lorna Wright and Joan Strudwick – and see what they were doing at the same time Ms. Puerto was doing the same thing or similar things, and see what was the intent those two individuals had when they undertook their duties and responsibilities at Bankest. And I think that answer is going to be very, very simple to that last question. Because nowhere in this case, not from – well, there was really only one witness it could have come from, and that's Carlos Mendez. But Carlos Mendez never once testified that Joan Strudwick and Lorna Wright did something with criminal intent.

Tr. 61:11108-09.

The reason, of course, "there was really only one witness it could have come from" was that the statements of the only people truly competent to testify about the Strudwick and Wright's intent – Strudwick and Wright themselves – had been excluded. So Mrs. Puerto was hamstrung, forced into the untenable position of asking the jury to accept the premise that Strudwick and Wright lacked criminal intent because the Government's star witness never testified that they possessed such intent.

The jury convicted Mrs. Puerto of 21 of the 32 counts: conspiracy to commit bank and wire fraud (count 1); bank fraud (counts 11-24); wire fraud (counts

31, 32, 37 & 38); and money laundering (counts 42 & 44). Mrs. Puerto was found not guilty on eight counts of bank fraud (counts 6-10 & 25) and conspiracy to commit money laundering (count 40) and money laundering (count 40). The Jury was deadlocked on the money laundering offenses charged in counts 45 and 58.

Mrs. Puerto filed a timely motion for new trial that reiterated her Fifth and Sixth Amendment rights to present the Strudwick and Wright statements, and the district court's error in refusing to sever the case once it decided to exclude those statements. R-873. The district court summarily denied the motion "for the reasons stated on the record during the trial. R-1017.

## G. THE ELEVENTH CIRCUIT OPINION

On August 12 2010, the Eleventh Circuit affirmed Puerto's conviction, ignoring that the district court had ruled the statements admissible and finding:

> We do not believe the district court abused its discretion when it denied Puerto's motion to sever because she could not have introduced the FBI statements in a severed trial.
>
> Statements to the above effect would have been inadmissible hearsay and did not fall under the exception for statements against penal interest under Fed.R.Evid. 804(b0(3). Under that rule,

hearsay statements will be allowed into evidence if the statement inculpates the declarant. The substance of the testimony Puerto wanted to introduce here was the opposite: it served to exculpate the declarants because the declarants were denying any knowledge of wrongdoing.

Therefore, the statements would not have been admissible even in a separate trial. The district court also properly found that the evidence was cumulative because Puerto elicited from Mendez on cross-examination that the coworkers performed functions like Puerto's and were not told of the fraud.

Accordingly, Puerto has not pointed to the compromise of a specific trial right, nor has she made a persuasive case that the jury was prevented from making a reliable judgment. We cannot conclude that the district court abused its discretion. [Footnotes ommitted].

## REASONS FOR GRANTING THE WRIT

**A writ should be granted here because this case presents and issue of first impression: Whether a co-defendant's confrontation rights can trump a defendant's right to present a defense, leading the district court to exclude exculpatory evidence and to deny a severance.**

A defendant's right to present her defense should never be trumped by a co-defendant's right to confront a witness. When defendants' constitutional rights collide, district courts must ensure that *all* constitutional rights are preserved. In this case, that meant granting a severance, so that Mrs. Puerto could present her defense.

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

*Washington v. Texas*, 388 U.S. 14, 19 (1967). "Few rights are more fundamental than that of an accused to present witnesses in his own defense." *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973). *See also Braswell v. Wainwright*, 463 F.2d 1148, 1154 (5th Cir. 1972) (right to compulsory process in obtaining witnesses is "a specific and fundamental constitutional right").

The joint prosecution of alleged co-conspirators is generally permissible for efficiency reasons, but district courts must be especially vigilant to safeguard the interests of all co-defendants because such trials raise unique risks to each defendant's constitutional rights.

Even if the co-defendants' respective positions are not entirely antagonistic, one risk in a joint trial is that one defendant's constitutional rights may conflict with those of his or her co-defendant. This Court addressed this very concern in *Zafiro:*

> We believe that, when defendants properly have been joined under Rule 8(b), a district court should grant a severance under Rule 14 only if there is a *serious risk that a joint trial would compromise a specific trial right of one of the defendants*, or prevent the jury from making a reliable judgment about guilt or innocence. Such a risk might occur when evidence that the jury should not consider against a defendant and that would not

be admissible if a defendant were tried alone is admitted against a codefendant. For example, evidence of a codefendant's wrongdoing in some circumstances erroneously could lead a jury to conclude that a defendant was guilty. When many defendants are tried together in a complex case and they have markedly different degrees of culpability, this risk of prejudice is heightened. *See Kotteakos v. United States*, 328 U.S. 750, 774-775 [ ] (1946). Evidence that is probative of a defendant's guilt but technically admissible only against a codefendant also might present a risk of prejudice. *See Bruton v. United States*, 391 U.S. 123 [ ] (1968). Conversely, *a defendant might suffer prejudice if essential exculpatory evidence that would be available to a defendant tried alone were unavailable in a joint trial. See, e.g., Tifford v. Wainwright*, 588 F.2d 954 (5th Cir. 1979) (per curiam). The risk of prejudice will vary with the facts in each case, and district courts may find prejudice in situations not discussed here. When the risk of prejudice is high, a district court is more likely to determine that separate trials are necessary, but, as we indicated in *Richardson v. Marsh*, less drastic measures, such as limiting instructions, often will suffice to cure any risk of prejudice. *See* 481 U.S., at 211[.]

506 U.S. at 539 (emphases and brackets supplied).

For this very reason – to guard against the sacrifice of a defendant's core right to a fair trial – "in joint trials, 'the trial judge has a continuing duty at all stages of the trial to grant a severance if prejudice does appear.'" *United States v. Johnson*, 478 F.2d 1129, 1132 (5th Cir. 1973) (quoting *Schaffer v. United States*, 362 U.S. 511, 516 (1960)). In *United States v. DiBernardo*, 880 F.2d 1216, 1226 (11th Cir. 1989) the Eleventh Circuit stated:

> [A] motion to sever based on the need for the exculpatory testimony of a co-defendant implicates the constitutional rights of the movant. *See United States v. Pepe*, 747 F.2d 632, 650-51 (11th Cir.1984); *Tifford v. Wainwright*, 588 F.2d 954 (5th Cir.1979). In the seminal case on this issue, our predecessor Court affirmed the grant of a petition for habeas relief from a state court judgment because the trial court's denial of the petitioner's motion to sever constituted a denial of due process. *Byrd v. Wainwright*, 428 F.2d 1017 (5th Cir.1970).

Here, the district court abused its discretion by refusing to sever when it was patently obvious that Mrs. Puerto was being denied her constitutional right to call critical witnesses in her defense, and it expressly refused to allow the "less drastic measure" of

allowing the testimony but giving the jury a limiting instruction. *See* Tr. 55-10080.

"[T]he exclusion of relevant, probative, and otherwise admissible evidence is an extreme sanction that should be used only when it is justified by 'some overriding policy consideration.'" *United States v. Davis*, 639 F.2d 239, 243 (5th Cir. Unit B 1981). Numerous cases explain that an "overriding policy consideration" does not mean things such as rigid adherence to procedural rules or the mere concern about efficiency of prosecuting multiple defendants in a joint trial. *See, e.g., DiBernardo*, 880 F.2d at 1228 ("While granting the motion to sever necessitated two trials, the teaching of *Byrd v. Wainwright* and its progeny is that judicial economy must yield to a defendant's right to a fair trial.").

Because the denial of Ariadna Puerto's motion for severance precluded her ability to mount a complete defense, it necessarily constituted reversible error. The district court ruled that Mrs. Puerto could not introduce critical evidence because doing so would infringe upon other defendants' confrontation rights. The district court had no discretion, however, to prioritize other defendants' Sixth Amendment rights over Ariadna Puerto's Fifth Amendment right to due process and Sixth Amendment right to present a complete defense. It is settled law that when a joint trial infringes on any one defendant's right to a fair trial, severance is required, legal technicalities and fictions notwithstanding. *See Bruton v. United States*, 391 U.S. 123 (1968).

In *Bruton*, this Court overturned George *Bruton's* conviction after his co-defendant's confession, which implicated not only the co-defendant but *Bruton* as well, was introduced at their joint trial. 391 U.S. at 124. The confessing co-defendant chose not to testify at trial and was thus not subject to cross-examination. *Id.* at 128. Even though the trial judge had instructed the jury not to consider the confession in determining *Bruton's* guilt, this Court held that the introduction of the confession violated *Bruton's* right to confront the witnesses against him. *Id.* at 125–26 & n.2. Here, the trial court confronted a reverse-*Bruton* situation, one in which *excluding* evidence violated Mrs. Puerto's right to present a complete defense. Mrs. Puerto sought to introduce evidence that she had a right to present but that her co-defendants had a right to exclude. The only way to proceed with a joint trial was to choose between Mrs. Puerto's right to present crucial evidence and her co-defendants' right to confront the witnesses against him.

As *Bruton* teaches, the Constitution does not permit a joint trial where only some or even most of the defendants receive a fair trial. Rather, the district court needed to bifurcate or sever the trials to afford both the co-defendants and Mrs. Puerto a constitutional and fair trial. *See also Tifford v. Wainwright*, 588 F.2d 954, 957 (5th Cir. 1979) (reversible error in not granting severance where "the issue of *Tifford's* knowledge of his co-defendants' criminal activities was central to the crimes charged by the indictment, and the defendants' testimony was essential to rebut the prosecution's proof on this crucial

issue").

The Government's *entire case* against Mrs. Puerto was based "only through linking a couple of inferences." Tr. 55-10086-87. There was zero testimony from anyone that Mrs. Puerto was ever told of the criminal scheme; that she ever said anything indicating her knowledge of the business's unlawful scheme; or that she ever profited even a penny from the illegality. Even the Government admitted that her sole motive for allegedly going along with the massive fraud scheme was "the salary" – her entirely legitimate, regular salary – and her "allegiance to her job." Tr. 55-10618. But the Government's sought to prove that she *must have* known about the illegal scheme based on the inference that she was a trusted employee who had worked her way up the company and was one of several people with check-writing authority. Mrs. Puerto was entitled to rebut this inferential reasoning by introducing the statements by fellow employees with many similar duties (including check-writing) who had no idea that a criminal scheme was occurring.

Both the Government and Mrs. Puerto touted Strudwick and Wright as key figures in their opening statements, and Mrs. Puerto had built her entire defense around their exculpatory statements. The Government listed them both as witnesses and presumably intended to call them; yet some eight weeks into the trial – toward the end of Mrs. Puerto's presentation of her defense case – their critical statements were snatched away from her. As the

district court acknowledged, she was denied this key evidence for one reason and one reason only: because she was being tried jointly with co-defendants. Stated another way, had Mrs. Puerto been tried for the exact same offenses in a separate trial, the exact same admissible and exculpatory evidence – which established her sole defense – would have been available to the jury in consideration of that defense.

Ms. Strudwick and Ms. Wright are sisters who worked as low-level employees at ES Bankest with Mrs. Puerto. Ms. Strudwick and Ms. Wright performed the same basic clerical tasks as Mrs. Puerto. Ms. Strudwick stated that her role with respect to paying accounts was ministerial and that she always adhered to the strict instructions of her supervisors. When Mrs. Puerto went to work at ES Bankest it was Ms. Strudwick and Ms. Wright who trained her in her job tasks. Ms. Wright specifically taught Mrs. Puerto to process invoice repayments. The two sisters told the FBI that they were never told they were doing anything wrong. Apparently they were convincing because Ms. Strudwick and Ms. Wright were not indicted.

Both Ms. Strudwick and Ms. Wright stated they did not realize that their work was furthering crimes. Had the jury heard what these witnesses told the FBI, the jury may well have seen Mrs. Puerto's defense as much more plausible than it otherwise appeared. From this testimony, the jury could have inferred that Mrs. Puerto's duties wouldn't have necessarily signaled to her that she was engaging in unlawful behavior. In

addition, the evidence indicated that no one ever informed Mrs. Puerto about the unlawful nature of the enterprise she was unwittingly supporting. The jury could have inferred that, because Ms. Strudwick and Ms. Wright were duped by their superiors and never became aware of what was going on, Mrs. Puerto was likewise fooled.

The FBI 302s would have also shown that, when Ms. Strudwick became suspicious about the CD Jewelbox account, it was Mrs. Puerto whom she went to discuss this with, reflecting her belief that Mrs. Puerto was not a knowing participant in the unlawful fraudulent behavior. This evidence would have further corroborated Mrs. Puerto's defense as it clearly showed that she could have worked closely with her co-defendants and yet remained unaware of the criminal activity. Moreover, this was the only evidence that could be used to demonstrate the plausibility of Mrs. Puerto's defense – that she, like Strudwick and Wright, was used as a pawn without knowledge of the criminal scheme that was afoot.

It is precisely the situation that this Court in *Zafiro* said would be constitutionally intolerable: "a defendant . . . suffer[ing] prejudice [because] essential exculpatory evidence that would be available to a defendant tried alone [is rendered] unavailable in a joint trial." 506 U.S at 539. Justice Stevens's words from that ruling echo loudly here: "[I]n all cases, the Court should be mindful of the serious risks of prejudice and overreaching that are the characteristic of joint trials, particularly when a conspiracy count is

included in the indictment. . . . [T]here is much more at stake here than administrative convenience." *Id.* at 545 (Stevens, J., concurring in judgment).

Although the Eleventh Circuit found that the evidence excluded was not admissible, the District Court correctly found that it was.

In fact, the district judge at no point retreated from his ruling that the statements of Ms. Wright and Ms. Strudwick were admissible. Instead, the judge based his denial of the motion to sever or bifurcate on the idea that the admissibility of the statements was a "close call" and not "incredibly clear-cut." Tr. 55-10086–87. This was a reversible error of law.

If the district court meant that Mrs. Puerto's right to present crucial evidence in a separate trial depended on whether the evidence was clearly admissible or barely admissible, that conclusion has no support. Alternatively, if, as is possible, this was an expression of the district court's concern that a separate trial for Mrs. Puerto would consume government resources, that also is no legal justification for curtailing Mrs. Puerto's case. Once the district court determined the statements were admissible, Mrs. Puerto had a right to present that crucial evidence to the jury. That constitutional right should not have been subordinated to considerations of judicial economy nor to the notion that the hearsay issue was a "close call" and not "incredibly clear-cut."

The cost of a new trial could not be weighed in

deciding whether to give effect to constitutional rights. In fact, all authority is to the contrary. *DiBernardo*, 880 F.2d at 1228 (11th Cir. 1989) ("While granting the motion to sever necessitated two trials, the teaching of *Byrd v. Wainwright* and its progeny is that judicial economy must yield to a defendant's right to a fair trial."); *United States v. Echeles*, 352 F.2d 892, 896 (7th Cir. 1965) ("[A] single joint trial, however desirable from the point of view of efficient and expeditious criminal adjudication, may not be had at the expense of a defendant's right to a fundamentally fair trial.").

Likewise, a defendant's right to present critical, relevant evidence depends in no way on whether its admissibility raises an easy or difficult evidentiary question. Admissible evidence is just that—admissible. There are no degrees of admissibility. For that reason, it was a clear error of law for the district court to predicate the denial of Mrs. Puerto's motion to sever or bifurcate the trial on the idea that the evidence was barely admissible. Contrary to the district court's apparent reasoning, the harm to Mrs. Puerto's defense and the denial of her constitutional right to present her case did not depend at all on whether the hearsay analysis was straightforward or intricate.

Although the Eleventh Circuit found that the excluded evidence was not admissible, the district court ruled that substantial portions of the FBI 302s memorializing the interviews of Strudwick and Wright were admissible. Tr. 54-9956-57. Specifically, the district court ruled that Mrs. Puerto's trial counsel could "call an agent and ask leading questions about

what Ms. Wright and Ms. Strudwick told the agents during interviews." Tr. 54-9956–57. Despite the Eleventh Circuit's ruling, there is no doubt whatsoever that the statements of Ms. Strudwick and Ms. Wright were admissible under Federal Rule of Evidence 804(b)(3), as the district court held.

The day after the district judge held the FBI 302 statements admissible and relevant to Mrs. Puerto's defense, the district court ruled that the Orlanskys' *Crawford* objection to the statements had to be sustained. In doing so, the district court stated that it was excluding "those statements made by Ms. Strudwick and Ms. Wright that *would otherwise be admissible as statements against penal interest under Rule 804(b)(3).*" Tr. 55-10067–70 (emphasis added). The district court then refused to sever or bifurcate the trial or to admit the statements with a limiting instruction, reemphasizing that the statements were admissible: "I don't change my ruling on that point, obviously." Tr. 55-10086.

It is clear that the district court's holding that the statements of Ms. Strudwick and Ms. Wright were admissible was well within the district court's discretion. The district judge meticulously

> thought about the issue, I did research on it, I read it yesterday here in chambers, and went through all of these reports page by page and highlighted what I thought might come within the ambit of 804(b)(3), and they are the ones that I

> mentioned to [the prosecutor], and no others.

Tr. 54-9956–57. The district judge then ruled that Mrs. Puerto's counsel could call an FBI "agent and ask leading questions about what Ms. Wright or Ms. Strudwick told the agents during interviews." *Id.*

That the prosecution itself insisted that Ms. Strudwick and Ms. Wright be informed of their Fifth Amendment rights, that they then invoked their rights and refused to testify for Mrs. Puerto, and that the district judge determined the invocation was valid suggest that the district court was correct in determining that the statements to the FBI were against penal interest.

Further still, even if the forms were not specifically excepted from the bar on hearsay, the district court could have and should have admitted them under Rule 807. *United States v. Rodriguez*, 218 F.3d 1243 (11th Cir. 2000) (finding out-of-court statements sufficiently reliable under residual hearsay exception).

*United States v. Ramirez-Lopez*, 315 F.3d 1143 (9th Cir. 2003), illustrates how the FBI 302s in this case fit well within Rule 807's scope. Judge Kozinski's dissent—which convinced the government to dismiss all charges despite having won on appeal[3]—explained

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3/ Judge Kozinski's dissent in that *Ramirez-Lopez* "caused the government to drop its charges after the conviction was affirmed

how INS agents' notes of interviews with smuggled aliens should have been admitted under Rule 807 in the trial of the alleged smuggler. 315 F.3d at 1174 (Kozinski, J., dissenting). Nine of the 12 smuggled aliens—all nine of whom exonerated the defendant—had been deported before trial. The government kept the only two who inculpated the defendant as well as three who exonerated him. Finding the interview notes analogous to statements of recorded recollection and further determining, having been made by trained government agents, the notes were reliable, Judge Kozinski concluded that they "fit neatly within the catch-all hearsay exception." 315 F.3d at 1176 (Kozinski, J., dissenting). The FBI 302s were likewise reliable recordings of what Ms. Strudwick and Ms. Wright told the FBI and the government has never suggested that they were not. Indeed, the government would be hard pressed to maintain that an official FBI report of witness interviews were *not* reliable. *Rodriguez*, 218 F.3d at 1250.

Judge Kozinski further noted in *Ramirez-Lopez* that a defendant "has a clear Sixth Amendment right to present evidence in his behalf:

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on appeal." Ilya Shapiro, *Hail to the Chief: Kozinski's Reign May Restore Sanity to the 9th Circuit*, LOS ANGELES DAILY J. (Dec. 24, 2007). *See also United States v. Ramirez-Lopez*, 327 F.3d 829 (9th Cir. 2003) ("In light of the district court's order dismissing the indictment with prejudice on March 6, 2003, the opinion filed January 10, 2003 is withdrawn.").

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. ... This right is a fundamental element of due process of law."

315 F.3d at 1176 (Kozinski, J., dissenting) (quoting *Washington v. Texas*, 388 U.S. 14, 19 (1967)). Given how crucial the FBI 302 statements were to Mrs. Puerto's defense, it could well be argued that if Mrs. Puerto had been tried separately, the evidence could not have fairly been excluded. "'Although the trial court has discretion to exclude testimony and will not be reversed absent an abuse of discretion, the trial court's discretion does not extend to exclusion of crucial relevant evidence.'" *United States v. Veltmann*, 6 F.3d 1483, 1495 (11th Cir. 1993) (quoting *United States v. Ethridge*, 948 F.2d 1215, 1218 (11th Cir. 1991)); *accord United States v. Todd*, 108 F.3d 1329, 1332 (11th Cir. 1997) ("Such discretion does not, however, extend to the exclusion of crucial relevant evidence necessary to establish a valid defense.") (quoting *United States v. Anderson*, 872 F.2d 1508, 1515 (11th Cir. 1989)); *United States v. Cohen*, 888 F.2d 770, 777 (11th Cir. 1989) ("The trial court's discretion does not extend to exclusion of crucial relevant evidence.") (quoting *United States v. Riley*, 550 F.2d 233, 237 (5th Cir. 1977)).

In any event, once the evidence was ruled material and admissible, Mrs. Puerto had a right to introduce it. In light of the co-defndants' *Crawford* objection, a severance was necessary so that she could present the evidence. The Eleventh Circuit did not dispute this. Instead, it attacked the evidentiary ruling that made the severance necessary and claims that the denial of the severance achieved the right result (exclusion of the evidence) by the wrong means (sustaining the co-defendants' *Crawford* objection instead of finding the evidence inadmissable). The Eleventh Circuit, however, did not come close to establishing that the district court's ruling was wrong, let alone an abuse of discretion.

In fact, it was well within the district court's discretion to find that the statements were admissible and to find that they were probative on the element of criminal intent. The evidence strongly and singularly corroborated Mrs. Puerto's defense—that she was unaware of any criminal activity at her workplace—because it established that the two people who trained her were likewise unaware.

Given that the district court found the evidence relevant to Mrs. Puerto's defense and admissible, it could not prioritize the co-defendants' Sixth Amendment Confrontation Clause rights over Mrs. Puerto's Fifth and Sixth Amendment rights to present a complete defense. It was therefore error to deny Mrs. Puerto's severance motion and a new trial is required for her.

## CONCLUSION

Based upon the foregoing petition, the Court should grant a writ of certiorari to the Court of Appeals for the Eleventh Circuit.

Miami, Florida
October,2010

Respectfully submitted,

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United States Court of Appeals,
Eleventh Circuit.
UNITED STATES of America, Plaintiff-Appellee,
v.
Ariadna PUERTO, Eduardo Orlansky, Hector Orlansky, Defendants-Appellants.
**No. 07-14097.**

Aug. 12, 2010.
Appeals from the United States District Court for the Southern District of Florida. D.C. Docket No. 03-20951-CR-AJ.

Before O'CONNOR,[FN*] Associate Justice Retired, CARNES and ANDERSON, Circuit Judges.

ANDERSON, Circuit Judge:

*1 In this fraud and money laundering case, the three appellants challenge their convictions and sentences. Appellants were charged with conspiracy to commit bank and wire fraud, bank fraud, fraud by wire, conspiracy to launder money, and money laundering.[FN1] Appellant Hector Orlansky was also charged with making false statements to the FDIC, in violation of 18 U.S.C § 1007.

## I. FACTS AND PROCEDURAL HISTORY

Appellants Hector and Eduardo Orlansky were in the factoring business, a legitimate financing service whereby the factor advances its client 80% of the value of the client's accounts receivable. The factor then tries to collect the full amount of the accounts receivable from its client's customer. The factor also charges the client a fee and interest on the advance that accrues until the client's customer pays the account. Through related entities, the Orlansky family owned and operated a factoring business called Bankest Capital Corporation ("BCC") for many years. Eduardo ran the company and Hector began working there in 1993. Appellant Puerto worked her way up from office manager to vice president and eventually BCC board of directors member.

The fraud began as early as 1994 when Joy Athletic ("Joy"), one of BCC's largest clients, had a customer refuse to pay and its receivables became past due. A BCC employee proposed altering the receivable's due date, which Eduardo endorsed; the altered reports were sent to Barclays, the lender to BCC at that time. During 1994, BCC's advances to Joy exceeded the 80% maximum required ratio of advances to accounts receivable, and Joy began warning that it might go bankrupt. The Orlanskys decided to advance Joy more funds based on future invoices.

At this point, Barclays decided to end its relationship with BCC, and the Orlanskys arranged financing from the Espirito Santo Group ("ESG"), an international banking and finance enterprise based in Portugal, through its Miami-based FDIC-insured bank, Espirito Santo Bank ("ES Bank"), of which Hector was on the board of directors. ES Bank became the primary victim of the fraud. Initially, the money from ESG flowed to the Orlansky-owned entity Bankest Receivables Finance and Factoring Corporation ("BRFFC"). To raise funds, BRFFC issued debentures which ES Bank marketed to international clients. Because BRFFC offered debentures, it agreed to be audited annually.

At the time the Orlansky entities and the ESG entities entered into the financing agreements, in 1994, BRFFC was already "out of formula" with Joy (i.e., had advanced funds to Joy in excess of 80% of the accounts receivable). This was concealed from ESG. Over time, the fraud escalated both in amount and complexity. By 1996, over 90% of the factoring business was tied to Joy, and Joy had been over-advanced $4 million. When Joy sought another $700,000, BCC agreed but required Joy's stock; after this, the Orlanskys considered themselves to be one-third owners of Joy. Neither the over-advances nor the ownership interests were disclosed to ESG.

*2 The Orlanskys and other BCC executives discussed how Joy's true condition could be concealed from the auditors, B.D.O. Seidman. They agreed to alter computer and other records to fool the auditors. From

that point on, Appellants continued to alter their records to make the business appear to be solvent. ESG relied on these audits in making its decision to become BCC's partner in 1998. In that year, ESG and BCC created a joint venture, ES Bankest ("Bankest").[FN2] Eduardo was chairman of the board of directors of Bankest, and Hector was its president and chief executive officer. Thus, the Orlanskys ran Bankest, while ES Bank's role in the venture was to market Bankest debentures to its international clients, thus providing funding for Bankest. Although Hector had pledged to Carlos Mendez-a co-conspirator who pleaded guilty and testified for the Government-to run Bankest legitimately, he soon reneged and resumed fraudulent activity.

Over time, the fraud became exceedingly complex, all designed to conceal the true financial condition of the factoring business from the auditors and from the lenders (the ESG entities and the debenture holders). It began by altering the due dates on real accounts receivable. Later, Appellants and their co-conspirators created phantom accounts receivable. Periodic collateral certifications were falsified. Insurance reports were fabricated. The fact of unsecured advances to Joy and other clients were concealed, as well as the Orlanskys' equity interest in Joy and the true financial position of Joy. This and other conflicts of interest were concealed not only from the lenders but also from ES Bank, the 50% joint venture partner. Computer records were altered to fool the auditors and lenders and misrepresent the financial status of the business so as to make the business appear to be

solvent and profitable. Appellants and their co-conspirators orchestrated complex transfers of funds between entities they controlled to hide the fact that clients were not paying back their advances or that accounts receivable were not being paid up. A few of the details of this extensive fraud follow.

One of the co-conspirators, Dominick Parlapiano, a key employee of the business, brought in a new client, CD Jewelbox ("CDJ") in 1997. In June 1999, Appellants discovered that CDJ was in fact a sham company created by Parlapiano, which had no real receivables. Almost $10 million was advanced to CDJ, approximately $500,000 of which was lost, having been pocketed by Parlapiano. Although the Orlanskys confronted Parlapiano, instead of revealing this thievery to ESG or to the police, the Orlanskys and Parlapiano moved all of the CDJ accounts to another client and fake activity was generated for that client as a coverup. All three Appellants knew these details with regard to CDJ and participated in the coverup, which consisted in part of moving the debt to other accounts, such as client Enterprise Network Applications ("ENA"), a telecommunications software producer.

*3 The Appellants engaged in a shifting of money between entities that they called "bicicleta," or cycling. By moving money between BCC and Bankest, and other entities, the Appellants created the appearance of payments on the debts. In what they called "bicicleta II," the Appellants wired money from BCC to a

compliant client and the client then wired a similar amount back, purporting to be a payment from a customer.

Appellants also engaged in an extensive undertaking of creating fake invoices and checks, falsifying letters from clients certifying the inflated accounts receivable, altering computer records, and signing letters falsely attesting that the Bankest financial statements were fair and accurate-all to pass the yearly audits. Similarly, the documents Hector submitted to the FDIC were full of misrepresentations.

The scheme began to unravel in Fall 2001. ES Bank had already wanted to reduce funding to Bankest when BCC learned that client United Container had filed for bankruptcy. The Orlanskys decided not to disclose this to ES Bank but in February 2002, the ES Bank president learned and confronted them. Eduardo told the president that the bankruptcy was recent; however, the president soon learned that not only was the bankruptcy not recent but that Bankest had been involved in the proceedings. In late February, ES Bank decided to terminate the joint venture and offered to acquire BCC's half interest in Bankest for $10 million. Out of fear that the fraud would be discovered, the Orlanskys counter-offered to buy out ES Bank's share and the bank agreed. Using funds that were mostly Bankest's, the Appellants amassed the required funds; $7 million of the $10 million purchase price was Bankest money. Because the purchase meant that the flow of money from debentures stopped, the Orlanskys

applied to ESG's principals for refinancing of Bankest's debt and the parties reached a restructuring agreement in November 2002 for the outstanding debt of $172 million. However, because Bankest had very little business and no new funding, it stopped making payments. As a result, ESG sued Bankest in July 2003, and the court appointed Lewis Freeman as examiner. Employees Parlapiano, Mendez, Puerto, and Ambrosiani balked at lying to the examiner while the Orlanskys assured them that these were only "white lies." Freeman attempted to contact the clients to collect and by the time of the trial in 2006, he had only collected $5 million on the $220 million receivables; Bankest owed ESG $170 million.

The Appellants were indicted in December 2003 for conspiracy to commit bank and wire fraud, bank fraud, wire fraud, conspiracy to commit money laundering, and money laundering; Hector was also indicted for making false statements to the FDIC. Appellants were indicted along with Otto Ambrosiani, Jeffrey Barnhill, Carlos Mendez, Parlapiano, and Howard Cantor, who all pled guilty. Mendez provided extensive testimony for the Government. Appellant Eduardo Orlansky argued that he was incompetent to stand trial and the district court held several hearings, as discussed in detail below, before rejecting his contention. Appellants proceeded to trial with Peter Stanham, who has not appealed. The jury convicted the Appellants on half of the counts, finding them guilty only of the charges that pertained to fraud that occurred after 1999. The Orlanskys were each sentenced to 240 months' imprisonment, Puerto was sentenced to 84

months, and all were ordered to pay restitution in the amount of $164,597,310.11.

## II. DISCUSSION

### A. Hector Orlansky-Sufficiency of the evidence

*4 [1] Hector argues that there was insufficient evidence to support his convictions because he was just a figurehead of the company and not involved in any of the financial transactions. Instead, he asserts, the fraud was perpetrated by members of the middle management, specifically Parlapiano, and he knew nothing of it.

We agree with the Government that there is more than sufficient evidence to support Hector's convictions. First, there was testimony that Hector approved the transfer of fake receivables, breaking his pledge to run the Bankest business "clean." Additionally, Mendez's testimony directly rebuts Hector's arguments that he was duped; Mendez testified to many meetings where over-advances were discussed and Hector was present. Hector also attended meetings where the employees discussed how the Joy situation could not be disclosed to ESG. And, he continued to represent to ESG that CDJ was a substantial asset even after he learned that it was a sham.

Much of Hector's argument is a credibility challenge to Mendez because it was Mendez's testimony that placed Hector at the key meetings and with the incriminating knowledge. We will not disturb a jury's credibility determination unless the testimony is "incredible as a matter of law." *United States v. Flores,* 572 F.3d 1254, 1263 (11th Cir.2009) (quotation omitted). Hector has not shown that the testimony was incredible, and there is significant documentary evidence that Hector knew what was going on and participated. For instance, the Government introduced into evidence Hector's seven-page letter denouncing the FDIC, objecting to the idea that Bankest buy more insurance, and accusing ES Bank of violating the shareholder agreement. Additionally, ES Bank president Balestra testified about Hector's attendance at almost all Bankest board meetings, his "fierce" resistence to the FDIC's request for information, and his insistence on using the same auditor BCC had always used for Bankest rather than Price Waterhouse. The jury clearly rejected Hector's argument that he unknowingly signed whatever was put in front of him.

For the money laundering counts, the Government needed to show concealment of funds. Concealment can be shown by evidence of unusual structuring, structuring of transactions to avoid attention, highly irregular features of the transaction, using third parties to conceal the real owner, or a series of unusual financial moves cumulating in the transaction. *See United States v. Majors,* 196 F.3d 1206, 1213 n. 18 (11th Cir.1999). Here, the BCC employees agreed that Joy's overadvance and the CDJ sham could not be

revealed, and numerous transactions were falsely attributed to Joy, ENA, CDJ, and others. The transactions were designed to create the impression that there was money, when in fact there was none. That was the sole purpose of the transactions although the larger fraud was intended to result in personal gain. As in *Majors,* the Appellants here used third parties (e.g., controlled entities, Joy and other compliant companies) to filter the money back and forth, under the bicicleta II fraud scheme. The Government showed Hector's knowledge through testimony by government financial expert Lew Sellers about the cycling and by Mendez that Hector did more than just sign checks-e.g., he referred to the transactions as "bicicleta." Additionally, Hector knew that ENA had very little income and yet he approved the transfers in ENA's name as if it was paying remittances. [FN3]

*B. Hector's Motion for Bifurcation or Mistrial*

*5 [2] Hector's argument regarding the motion to bifurcate and Puerto's motion to sever pertain to the same issue: whether Puerto's defense was antagonistic to the other Defendants'. In essence, Puerto's defense was that she did not know what was really going on and to the extent that she did, she was afraid that she would lose her job because the Orlanskys had fired a whistleblower earlier. During cross-examination of Mendez, when this became apparent, Eduardo's attorney moved for a severance; Hector adopted the motion. The court, however, denied the motion. All of

the defendants but Puerto had already completed their defenses at this point so they moved to bifurcate the trial. They proposed proceeding to their closing arguments and having the jury decide on their guilt or innocence, all before Puerto's defense. After the verdict, the same jury would then hear Puerto's defense and deliberate her fate. The Government opposed the proposal. After taking a proffer of Puerto's defense, the district court decided not to bifurcate. The other defendants renewed their motion when Puerto elicited testimony that she was scared to approach the Orlansky brothers because of an earlier whistleblower's firing. The court again denied the motion.

The district court did not abuse its discretion. *See United States v. Knowles*, 66 F.3d 1146, 1159 (11th Cir.1995) (reciting standard of review). First, the court gave a curative instruction regarding the statement that Puerto was afraid of the Orlanskys. Puerto elicited from her husband while he was testifying that she was afraid of the Orlanskys because they had fired a whistleblower and then the Government elicited a similar statement, to which Eduardo's attorney objected. The court instructed the jury to

> disregard Mr. Puerto's testimony other than what he told his wife.... Whatever Mr. Puerto has testified to here, which is based upon things that Ms. Puerto said, or things he learned from someone else, for example, the testimony he just gave, that testimony is stricken. You are to disregard it and not consider

it in any way whatsoever. The same goes for prior testimony concerning what Ms. Puerto said she believed might happen as a result of what she and her husband apparently discovered.

We have held that we will only reverse a refusal to grant a mistrial when the evidence is "so highly prejudicial as to be incurable by the trial court's admonition." *United States v. Perez,* 30 F.3d 1407, 1410 (11th Cir.1994). Hector has failed to persuade us that this evidence was so highly prejudicial that it would not be cured by this instruction.

Second, this court has expressed concern over bifurcation of trials; specifically, it has worried that the jury who determines the guilt of the first defendants may not be impartial when faced with the later-decided defendants. *See United States v. McIver,* 688 F.2d 726, 729 (11th Cir.1982). As Hector admits, the decision of whether or not to bifurcate requires a balancing of competing interests. Here, the district court determined that the defendants' defenses were not antagonistic, let alone antagonistic enough to overcome the competing interests of efficiency and concerns about prejudice to the remaining defendant. The court found that Puerto's defense-that the fraud was not obvious to low-level employees-was not antagonistic to the Orlanskys' theory of defense that the middle-level managers Parlapiano and Mendez orchestrated the fraud and kept the brothers in the dark. "[T]o compel severance, the defenses of co-defendants must be more than merely antagonistic,

they 'must be antagonistic to the point of being mutually exclusive.' " *Knowles,* 66 F.3d at 1159. Lack of knowledge on the part of both the Orlanskys and the low-level employees is certainly not antagonistic.

*6 Third, the court rejected most of Puerto's proffer of state of mind evidence, allowing her only to elicit testimony about her state of mind from family members, without getting into the nature of why she felt the way she said she felt. Any evidence of her fears was brought in through her family members and did not constitute significant testimony. Therefore, we conclude the court did not abuse its discretion.

*C. Puerto's motion to sever*

Puerto argues that the district court's denial of the motions to sever denied her the opportunity to introduce essential exculpatory evidence. Puerto sought to introduce statements made to the FBI by two of her low-level co-workers to the effect that they did not realize there was fraud occurring at the firm. This evidence demonstrated her lack of knowledge, she argues, because these workers were the ones that trained her and did many of the same tasks. Puerto tried to call the coworkers but each invoked the Fifth Amendment and refused to testify. Then, Puerto's co-defendants each objected to the admission of the FBI statements on the basis that the admission would violate their Confrontation Clause rights. Puerto argues that this is a rare case of a defendant suffering

prejudice simply because of a joint trial.

We review the district court's decision for abuse of discretion. *Zafiro v. United States,* 506 U.S. 534, 541, 113 S.Ct. 933, 939, 122 L.Ed.2d 317 (1993). There the Court held: "We believe that, when defendants properly have been joined under Rule 8(b), a district court should grant a severance under Rule 14 only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." *Id.* at 539, 113 S.Ct. at 938.

We do not believe the district court abused its discretion when it denied Puerto's motion to sever because she could not have introduced the FBI statements in a severed trial. Statements to the above effect would have been inadmissible hearsay and did not fall under the exception for statements against penal interest under Fed.R.Evid. 804(b)(3).[FN4] Under that rule, hearsay statements will be allowed into evidence if the statement inculpates the declarant. The substance of the testimony Puerto wanted to introduce here was the opposite: it served to exculpate the declarants because the declarants were denying any knowledge of wrongdoing.[FN5] Therefore, the statements would not have been admissible even in a separate trial.[FN6] The district court also properly found that the evidence was cumulative because Puerto elicited from Mendez on cross-examination that the coworkers performed functions like Puerto's and were not told of

the fraud. Accordingly, Puerto has not pointed to the compromise of a specific trial right, nor has she made a persuasive case that the jury was prevented from making a reliable judgment. We cannot conclude that the district court abused its discretion.[FN7]

*D. Hector's Sentence*

***7** [3] Hector argues that the district court erred in assessing him a two-level increase in his offense level for sophisticated laundering under § 2S1.1(b)(3). Hector submits that he did not engage in the planning of the layering of transactions that took place, and that although the jury found him guilty of various conspiracy charges, the level of sophistication for this enhancement was entirely attributable to another individual.

Section 2S1.1(b)(3) of the Sentencing Guidelines provides for a two-level increase in a defendant's offense level if he was convicted under 18 U.S.C. § 1956 and "the offense involved sophisticated laundering." The commentary provides that "sophisticated laundering" means "complex or intricate offense conduct pertaining to the execution or concealment of the 18 U.S.C. § 1956 offense." U.S.S.G. § 2S1.1, comment. (n.5(A)). The commentary continues, "Sophisticated laundering typically involves the use of-(i) fictitious entities; (ii) shell corporations; (iii) two or more levels (i.e., layering) of transactions, transportation, transfers, or transmissions, involving

criminally derived funds that were intended to appear legitimate; or (iv) offshore financial accounts." *Id.*

This Court reviews a district court's findings of fact for clear error and its application of the Sentencing Guidelines *de novo. United States v. Gupta,* 572 F.3d 878, 887 (11th Cir.2009). "A factual finding is clearly erroneous when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. Robertson,* 493 F.3d 1322, 1330 (11th Cir.2007) (quotation omitted).

The district court did not clearly err in assessing Hector an enhancement for sophisticated laundering. The court found that the "cycling of money" enabled the fraud to continue, and that the cycling constituted "layering" as described in the commentary to § 2S1.1(b)(3). Hector was involved in a wire-transfer scheme involving the circular transfer of funds between various companies to create the illusion of revenues that enabled the perpetuation of the fraud. Hector was one of only three individuals authorized to sign the checks and underlying wire-transfer forms. This cycling of funds constitutes "two or more levels (i.e., layering) of transactions, transportation, transfers, or transmissions, involving criminally derived funds that were intended to appear legitimate," such that the district court did not clearly err in assessing Hector the enhancement.

Next, Hector argues that his 20-year sentence was "clearly and unequivocally unreasonable" because it was "quite possibly a death sentence." He argues that the mitigating circumstances, specifically his age, health, and lack of a prior criminal record, militated in favor of a lower sentence.

We will remand for resentencing only if we are "left with the definite and firm conviction that the district court committed a clear error of judgment in weighing the § 3553(a) factors by arriving at a sentence that lies outside the range of reasonable sentences dictated by the facts of the case." *United States v. Pugh*, 515 F.3d 1179, 1191 (11th Cir.2008) (citation and quotation marks omitted).

*8 Here, there was no clear error. Although the district court stated that several § 3553(a) factors (e.g. health and age) supported Hector's not receiving a lengthy term of imprisonment, the court noted that some of the § 3553(a) factors called for a "very severe sentence." In particular, with respect to the nature of the offense, the court noted that the case involved a "huge amount of loss" and noted that approximately $167 million in loss was "a staggering sum." Additionally, the court noted that the crime took place "over a period of years" and found that Hector knew, at least as early as the middle of 1998, that a fraud was taking place. The court determined that the scheme was intended to further Hector's financial interest and pointed out that his sentence was not different from that received by another individual involved in the offense who had

pled guilty. Moreover, the court reasoned that the need for the sentence to constitute sufficient punishment supported a severe sentence, given the "large-scale, massive bank fraud," which was the "largest bank fraud that the Southern District has seen." We agree with the district court that the record supported the sentence.

*E. Puerto's sentence*

[4] Puerto argues that her sentence was procedurally unreasonable because the district court incorrectly calculated her guideline range. Specifically, she argues that the court's calculation of the loss amount was improper because it was based on facts not found by a jury beyond a reasonable doubt. Puerto acknowledges that this Court and the Supreme Court permit such judicial fact-finding by a preponderance of the evidence, but she submits that her case presents the rare example where such fact-finding is impermissible because of the enormous increase that resulted from finding $167 million in loss attributable to her.

Puerto's sentence was procedurally reasonable. Her only argument is that the district court erroneously calculated her guideline range because it based the loss calculation on facts the court found by a preponderance of the evidence. However, this Court's precedent permits a court to base guideline enhancements on facts it finds by a preponderance of the evidence, as long as the court treats the Guidelines

as advisory and does not impose a sentence that exceeds the maximum permitted by the jury verdict. *See United States v. Douglas,* 489 F.3d 1117, 1129 (11th Cir.2007); *United States v. Campbell,* 491 F.3d 1306, 1314 n. 11 (11th Cir.2007). Here, the district court treated the Guidelines as advisory and did not impose a sentence above the statutory maximum authorized by the jury verdict. Therefore, the court was authorized to calculate the amount of loss based on facts it found by a preponderance of the evidence and we affirm her sentence.

*F. Eduardo's Mental State*

The district court addressed two separate but related issues regarding Eduardo's mental state: his competency to stand trial and his attempt to raise his mental state as a defense. We turn first to Eduardo's attempt to introduce expert testimony about his mental state.

1. Eduardo's challenge to the district court's exclusion of his experts' mental health testimony

*9 Eduardo sought to introduce evidence about his diminished mental state during the relevant time period for three reasons. The first was to support his insanity defense under the Insanity Defense Reform Act ("IDRA"), 18 U.S.C. § 17 (2000). Second, he sought to introduce the evidence as a means of challenging the

Government's argument that he had the requisite mens rea to commit the charged crimes. Third, he sought to introduce evidence of his diminished mental state to support his claim that he had been kept in the dark about the fraud and it had been orchestrated by lower level management.

Eduardo submitted a Notice of Insanity Defense and Expert Evidence of Mental Condition, which included reports from neuropsychologist Dr. Barry Crown and neurologist Dr. Jeffrey Gelblum (Eduardo's treating neurologist). He also included the report from an MRI, which reportedly showed evidence of an old stroke in his left caudate nucleus and a large, "very old" fluid accumulation in his left temporal and temporal frontal region, which probably resulted from a stroke. In response, the Government moved to exclude evidence that Eduardo suffered from a mental defect, for a *Daubert*[FN8] hearing, and to exclude the testimony of the two doctors. The district court excluded the testimony of the two doctors both because it was inadmissible under the IDRA and because it was inadmissible under Fed.R.Evid. 702 and *Daubert*. Eduardo challenges both rulings; we address each in turn.

a. The legal standard under the IDRA

Under the IDRA, insanity is an affirmative defense that the defendant must prove by clear and convincing evidence. 18 U.S.C. § 17; *United States v. Westcott,* 83 F.3d 1354, 1357 (11th Cir.1996). The Act restricted the

definition of insanity:

> at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts. Mental disease or defect does not otherwise constitute a defense.

18 U.S.C. § 17(a). Before the Act's passage, a defendant could also assert a valid defense if he was unable to conform his conduct to the requirements of the law. *United States v. Freeman*, 804 F.2d 1574, 1576 (11th Cir.1986). However, as the second sentence of the Act recites, Congress prohibited the use of " 'non-insanity' psychiatric evidence that points toward 'exoneration or mitigation of an offense because of a defendant's supposed psychiatric compulsion or inability or failure to engage in normal reflection.' " *United States v. Cameron*, 907 F.2d 1051, 1066 (11th Cir.1990). "Congress intended to prohibit the presentation of evidence of mental disease or defect, short of insanity, to excuse conduct." *Westcott*, 83 F.3d at 1357-58. In passing the IDRA, Congress considered that such prohibited evidence would, if allowed to go to the jury, resurrect the former, broader version of the insanity defense "in the guise of showing some other affirmative defense, such as ... diminished responsibility ... and open the door, once again, to needlessly confusing psychiatric testimony." *Cameron*, 907 F.2d at 1066 (quoting S.Rep. No. 98-225, 98th Cong., 2d Sess. 229 (1984), reprinted in 1984 U.S.C.C.A .N. 3182, 3411)

(internal punctuation omitted). However, we have held that Congress did not intend to exclude the use of psychiatric evidence that negated specific intent. *Westcott*, 83 F.3d at 1358; *Cameron*, 907 F.2d at 1066-67.[FN9] We examine the testimony of each of the proffered experts in turn.

i. Dr. Jeffrey Gelblum

***10** Eduardo's treating neurologist testified at the four-day hearing in November 2005 about his diagnosis of Eduardo, the etiology of Eduardo's illness, and his opinion about Eduardo's mental state. He testified that he had diagnosed Eduardo in 2004 with progressive vascular dementia based on reports by his family of deficits in activities of daily living and an MRI and an electroencephalogram ("EEG"), neurological tests that pinpoint the dementia's causes. The MRI showed that a region in Eduardo's brain's left hemisphere was cavitated out, meaning that the brain tissue had been replaced with fluid. Dr. Gelblum testified that Eduardo had significant damage to the left temporal lobe, the left frontal lobe, and the left parietal lobe, which suggests interference of brain functioning in a critical part of the brain. He explained that the left side of the brain primarily controls right-sided body function, as well as comprehension, arithmetic, executive planning, and fluency. Memory is also impaired with this type of injury, with short-term memory being most prominently affected because it is relegated to the left temporal lobe.

Dr. Gelblum opined that the damage to Eduardo's brain was caused by an arachnoid cyst and superimposed stroke syndrome. Arachnoid cysts are congenital, meaning that the patient was born with the cyst, and Dr. Gelblum explained that superimposed stroke syndrome refers to small, "silent" strokes. While the MRI could not give an exact date of onset, Dr. Gelblum speculated that the degree of whiteout in the brain suggested that the damaged area had been fluid-filled for "six, seven, [or] eight years." But he conceded that because he did not have access to previous MRIs, he could not determine if the cyst had been growing or if it had been that size since birth; the MRI and the EEG could only provide a snapshot of the patient's current condition.

At the time that Dr. Gelblum began to treat Eduardo, in May 2004, Dr. Gelblum thought that Eduardo was legally insane. However, he testified that there is no scientifically valid way for him to ascertain Eduardo's mental state before that time. Additionally, he agreed that talking to family about the patient's past behaviors could not scientifically determine the patient's mental state in years past. When asked if there was any scientifically reliable way of determining if Eduardo had the capacity to deceive during the period from 1994 to 2003, Dr. Gelblum answered "we don't have those scans or studies, no."

Because Dr. Gelblum testified that he relied upon the reports of family and friends to make diagnoses, Eduardo introduced evidence from Eduardo's wife,

Jane, and later trial testimony from his former employee, Mendez. Jane Orlansky testified that Eduardo had begun to act strangely beginning in 1992 or 1993, engaging in what she termed ritualistic behavior. She also noted a decline in his intelligence and short term memory. However, she testified that she did not recommend to him that he seek any professional or medical help for the strange behavior that he began to exhibit. Similarly, Mendez testified to Eduardo's ritualistic behavior. Although Jane Orlansky's and Mendez's testimony may have suggested that Eduardo was beginning to develop dementia during the time period at issue, Dr. Gelblum did not testify that, on the basis of the testimony of Jane and Mendez, he could opine with any degree of medical certainty that Eduardo was unable to appreciate the nature and quality or wrongfulness of his actions during the relevant time period.[FN10]

*11 While Dr. Gelblum testified that accounts from family of behavior and patient history comprise ninety-five percent of the information required for diagnosis, as the district court noted, Dr. Gelblum did not state that he relied on those accounts in his letters or reports when he wrote that, at the time of the crimes, Eduardo suffered from severe mental defect such that he could not appreciate the wrongfulness of his actions. And he affirmatively testified that because he did not examine Eduardo in the period before 2004, he could not render an opinion about Eduardo's ability or capacity to lie during that period. Although he did try to rectify his opinion by testifying that he could rely on family reports to make a retroactive diagnosis, he

did not testify that he could opine with any degree of medical certainty that Eduardo was unable to lie or deceive at the time of the crimes.

ii. Dr. Barry Crown

Dr. Crown is a neuropsychologist who administered a series of psychological tests to Eduardo in order to ascertain the severity of the damage caused by the arachnoid cyst and the stroke syndrome identified by the neurologists. His report stated that he would testify that at the time of Eduardo's involvement in the criminal acts, Eduardo was suffering from vascular dementia with significant cognitive loss. Further, he wrote, Eduardo, "at best, would have been performing at a twelve year old level" on his language-based critical thinking and abstract problem-solving ability.

During the hearing, Dr. Crown testified that all of the tests he administered to Eduardo only showed Eduardo's capabilities at the time of the tests' administration. When asked specifically if he could testify as to Eduardo's mental condition during the relevant period of the case, he stated that could not provide an opinion. He testified that his statement in the report was based on his understanding that Eduardo was not in the acute stage of the illness and that his illness had been progressing for some time. However, he admitted that he had no way to "date stamp it," and that the rate of decline varies by individual. The district court then asked Dr. Crown if

he could say "to any degree of medical certainty when that significant cognitive loss occurred?" Dr. Crown replied: "No, other than Mrs. Orlansky relating to me that she felt that he deteriorated, and that there were problems at or about the time of a civil lawsuit that took place well over ten to 12, 14 years ago. But that's the only historical bit of information that I have that suggests a point of noticeability." Finally, when asked if he could state with any degree of scientific certainty that Eduardo was insane at any point during the ten-year period that the charge embraced, Dr. Crown answered no.

iii. Analysis

[5] The district court properly noted that the IDRA allows a defendant to put on an affirmative defense that, as a result of a severe mental disease or defect, he was unable, at the time of the commission of the acts constituting the offense, to appreciate the nature and quality or the wrongfulness of his acts. 18 U.S.C. § 17(a). We also noted above that in the IDRA, Congress intended to prohibit the use of non-insanity psychiatric evidence that points to exoneration or mitigation of an offense, but that Congress did not intend to exclude the use of psychiatric evidence that negated specific intent. *Westcott*, 83 F.3d at 1358; *Cameron*, 907 F.2d at 1067. However, the IDRA specifically requires that such evidence focus on the defendant's state of mind at the time of the charged offense. *See Cameron*, 907 F.2d at 1067 ("Evidence offered as psychiatric evidence to negate specific intent is admissible, however, when

such evidence focuses on the defendant's specific state of mind at the time of the charged offense.") (internal quotations omitted).

*12 Eduardo's problem is that neither Dr. Gelblum nor Dr. Crown could provide testimony about what Eduardo's state of mind was at the time of the charged acts. At most, they could speculate that he had begun to decline during that period, but because they did not examine Eduardo during the period, they could not state with any degree of medical certainty that he lacked the ability to appreciate the nature and quality or wrongfulness of his acts at that time. Moreover, because they did not know what his mental state was during the relevant time, they also could not opine with any degree of medical certainty with respect to his mens rea during the relevant time period. For this reason, the district court held that the IDRA rendered the testimony of the two doctors inadmissible.

The district court (Judge Adalberto Jordan) exhaustively explored this evidence and its admissibility. First it held a four-day hearing in November 2005, during which it actively questioned the experts and after which it produced two well-reasoned and comprehensively analyzed orders excluding the evidence. Additionally, the court undertook reconsideration of the decision mid-trial and again determined that the evidence could not meet the IDRA's standards.[FN11] In view of the careful and comprehensive consideration by the district court,[FN12] and because neither doctor could testify with any

degree of medical certainty that Eduardo-at the time of the offense-was "unable to appreciate the nature and quality or the wrongfulness of his acts" or that he actually lacked the necessary mens rea at that time, we cannot conclude that the district court abused its discretion in excluding the testimony of Dr. Gelblum or Dr. Crown.[FN13]

b. Rule 702 of the Federal Rules of Evidence

The district court also denied admission of the testimony based on Rule 702 of the Federal Rules of Evidence, which controls the admission of expert testimony. It provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

The Supreme Court has instructed that Rule 702 compels the district courts to perform a critical "gatekeeping" function concerning the admissibility of expert scientific evidence. *Daubert v. Merrell Dow*

*Pharm.*, 509 U.S. 579, 589 n. 7, 597, 113 S.Ct. 2786, 2795 n. 7, 2798, 125 L.Ed.2d 469 (1993). "This function 'inherently require[s] the trial court to conduct an exacting analysis' of the foundations of expert opinions to ensure they meet the standards for admissibility under Rule 702." *United States v. Frazier*, 387 F.3d 1244, 1260 (11th Cir.2004) (en banc) (quoting *McCorvey v. Baxter Healthcare Corp.*, 298 F.3d 1253, 1257 (11th Cir.2002)).

***13** This court employs a three-part inquiry to determine admissibility under Rule 702. The trial court must consider whether:

> (1) the expert is qualified to testify competently regarding the matters he intends to address; (2) the methodology by which the expert reaches his conclusions is sufficiently reliable as determined by the sort of inquiry mandated in *Daubert;* and (3) the testimony assists the trier of fact, through the application of scientific, technical, or specialized expertise, to understand the evidence or to determine a fact in issue.

*Id.* Here, the district court denied admissibility of the testimony of Doctors Gelblum and Crown based on the second and third prongs of the inquiry, reliability and assistance to the trier of fact. While the Court in *Daubert* recognized that "it would be unreasonable to conclude that the subject of scientific testimony must be 'known' to a certainty," it held that "in order to

qualify as 'scientific knowledge,' an inference or assertion must be derived by the scientific method." 509 U.S. at 590, 113 S.Ct. at 2795. "Proposed testimony must be supported by appropriate validation-i .e., 'good grounds,' based on what is known." *Id.* Further, assistance to the trier of fact is primarily a question of relevance. *Id.* at 591, 113 S.Ct. at 2795. Therefore, the question is whether the evidence will help the jury decide a factual dispute; "Rule 702's 'helpfulness' standard requires a valid scientific connection to the pertinent inquiry as a precondition to admissibility." *Id.* at 591-92, 113 S.Ct. at 2796.

As discussed in reference to the IDRA, there did not exist " 'good grounds,' based on what is known." Neither of the proposed expert witnesses could testify with any medical certainty that Eduardo was either insane at the time of the offenses or lacked the requisite mens rea at the time of the offenses. [FN14] Therefore, the district court's conclusion that the evidence failed both the reliability and assistance to the trier of fact prongs was not an abuse of discretion.[FN15]

2. Competency to stand trial

[6] Eduardo did not argue that he was incompetent to stand trial until November 2005, almost two years after his indictment. At that time, the defense submitted a motion for a hearing to determine

competency in response to a letter the Government had provided from neurologist Ranjan Duara, M.D., that suggested Eduardo's cognitive function might be compromised to the extent that he was mentally incapacitated. Previously, Eduardo's treating physician, Dr. Jeffrey Gelblum, had opined that Eduardo was competent, although he had noted that his condition was progressively declining. After Dr. Duara's letter, Dr. Gelblum reexamined Eduardo and submitted a new report opining that Eduardo was not competent.

The court first heard testimony about Eduardo's competency on November 23, 2005. At that time, the Government sought a 30-day, in-house competency assessment by Dr. Robert Denney. Dr. Denney testified that, contrary to defense arguments, the stay would not be detrimental to Eduardo's mental health but would, in fact, give a more comprehensive assessment of his abilities and deficits. Two other Government witnesses testified at that time about Eduardo's competency. Dr. Michele Quiroga, a neuropsychologist, testified about the tests she administered to Eduardo, her interviews with him and his wife, and her diagnosis. As a result of her examination, Dr. Quiroga determined Eduardo to be competent, not suffering from severe mental disease or defect, and to be able to appreciate the nature and quality of his acts. She further stated that although he did appear to have cognitive deficits, she also detected lack of effort and malingering. Dr. David Fishbain, a psychiatrist, evaluated Eduardo by administering a mental status exam and interviewing him and his wife. Further, Dr.

Fishbain reviewed Eduardo's business correspondence and notes ranging from 1996 to 2003, witness statements about Eduardo's abilities during the same period, his medical records, and Dr. Quiroga's evaluation. He testified that he believed that Eduardo was competent, with his judgment and insight within normal limits, although he did suffer from mild cognitive impairment. Additionally, Dr. Fishbain opined that although Eduardo might have some difficulty disclosing pertinent facts, it was a mild defect in that respect. After hearing from the experts, the district court agreed to the in-house assessment, and Eduardo was sent to the United States Medical Center for Federal Prisoners in Springfield, Missouri.

*14 At the end of February 2006, the court held a four-day competency hearing beginning with Dr. Denney, who had conducted the month-long assessment. Dr. Denney testified that although he thought that Eduardo had some damage to his brain, he thought that Eduardo was malingering. This finding comported with the assessment of another witness, Dr. Quiroga. Dr. Denney administered 26 psychological tests over a nine-day period, including six that were designed to detect malingering; Eduardo tested positive for poor effort on five of those tests. As a result, Dr. Denney did not believe that the remaining neurological test results were valid indicators of Eduardo's true neuropsychological functioning. Ultimately, Dr. Denney posited that Eduardo's current neuropathology did not support a diagnosis of dementia, and neither did the functional imaging results (SPECT and PET scans). Furthermore, the test

results did not comport with the conversations Dr. Denney had with Eduardo during interviews and casual conversation. Finally, Dr. Denney compared Eduardo's test scores to those from prior administrations and noted significant departures that were not logically or reasonably consistent; in some cases Eduardo actually improved, which would not be the case if he had progressive dementia.

Dr. Gelblum testified that he still believed that Eduardo basically understood the charges against him but that he was not able to assist his attorneys in preparing his defense and thus was not competent to stand trial. Further, the damage revealed in the scans of Eduardo's brain was tied to Eduardo's ritualistic behaviors and impaired his executive planning ability, memory search retrieval, and performance on verbal manual tests. Another defense expert, Dr. Joseph Sesta, a forensic neuropsychologist and clinical pharmacologist, testified that his review of the tests Dr. Denney performed did not suggest that Eduardo was malingering. Instead, he thought the results seemed compatible with a true neuropathology, as reflected in Eduardo's neuroimaging studies.

Although the court ruled orally that the Government had shown that Eduardo was competent, it ordered another round of testing "in an abundance of caution." The court then appointed Dr. Charles Golden to evaluate Eduardo for competency. Dr. Golden performed his evaluation of Eduardo without seeing any of the other experts' reports and concluded that

Eduardo was not competent to stand trial. Dr. Golden stated in his report that Eduardo was incapable of distinguishing between accurate and inaccurate memories. Before the renewed competency hearing, Dr. Golden was given all of the other experts' reports to review. At the renewed hearing, which took place during the trial, Dr. Golden testified that injuries to Eduardo's anterior left hemisphere meant that he could no longer effectively retrieve memories and that he had holes in his memory that he attempted to fill with erroneous information. He explained Eduardo's test results, where he scored in the low-normal range, by noting that Eduardo's deficits did not affect his intelligence or ability to function on a day-to-day basis. He further testified that Eduardo's working memory was intact but his intermediate memory was disturbed and that although his long-term memory was there, he was not able to extract information in an organized manner. Like Dr. Denney, Dr. Golden did not think that Eduardo had dementia or primary memory deficit. But Dr. Golden thought that Dr. Denney was too quick to conclude that Eduardo was malingering; he thought that was especially true because he had seen the same pattern of test scores in other individuals with the same type of brain injury. Dr. Golden explained that Eduardo's problems were with processing large amounts of information and organizing it. As a result, he would not be capable of assisting his counsel when presented with documents.

*15 After the hearing, the district court again found Eduardo competent. Almost a year later, at the initial sentencing, the court denied without prejudice his

motion to be declared incompetent but entertained a supplemental motion. On August 13, 2007, the court issued a comprehensive order, explaining its decision that Eduardo was competent.

We review the district court's finding that the defendant is competent to stand trial for clear error. *United States v. Izquierdo,* 448 F.3d 1269, 1276 (11th Cir.2006). A district court's findings of fact are clearly erroneous "only when we are left with a definite and firm conviction that a mistake has been committed." *Id.* at 1278 (quotation omitted). Additionally, "[w]here there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Id* . (citation omitted).

A defendant is mentally incompetent to stand trial when he is "suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense." 18 U.S.C. § 4241(a). In order to be considered competent for trial, a defendant must have "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding," and he must have a "rational as well as factual understanding of the proceedings against him." *United States v. Cruz,* 805 F.2d 1464, 1479 (11th Cir.1986) (quotation omitted). Here, Eduardo challenges only the first prong of the test, i.e. the ability to consult with his attorney. While the experts may provide evidence about the defendant's state of

mind and abilities, the ultimate decision about competency lies with the district court. *United States v. Makris*, 535 F.2d 899, 907 (5th Cir.1976).[FN16]

We begin initially by observing that the district court sought many opinions and held extensive hearings on this issue. After hearing testimony from both defense and government experts, the court had Eduardo sent to a facility to be tested and observed for a month. Then, after that evaluation and more testimony from more experts, the court appointed Dr. Golden to assess Eduardo's competency. Four psychologists administered psychological tests to Eduardo and a fifth reviewed the others' tests and gave his opinion; Eduardo's MRIs and scans were evaluated by at least five neurologists. All of these experts gave different opinions about the severity and the cause of the damage in Eduardo's brain. The neurologists disagreed about whether his EEGs were abnormal and what caused the cavitated area of his brain. Some of the psychologists attributed his test scores to malingering while others looked at the same scores and determined that they represented a precise injury to a specific part of the brain.

Thus the district court was left to evaluate several expert opinions of the nature and severity of Eduardo's condition. The court determined that Dr. Denney's opinion was more reliable because of his experience conducting competency evaluations, his impressive credentials, and his ability to evaluate Eduardo over a long period of time. *See Izquierdo*, 448 F.3d at 1279

(approving district court's reliance on psychiatrist's opinion when that expert had examined the defendant over a longer period than the other expert). It also noted that Dr. Denney's finding of malingering was corroborated by Dr. Quiroga's similar finding.

***16** We cannot conclude that the district court's finding was clearly erroneous. Dr. Denney had conducted, at the time of the competency hearing, over 500 competency evaluations and he had found defendants incompetent approximately 23% of the time. We note that Dr. Denney's evaluation, taking place as it did over a month in a resident facility, permitted him to observe Eduardo throughout the day and consistently, something the other experts did not have the ability to do. Dr. Denney based his ultimate determination that Eduardo was competent and was malingering not just on interviews with Eduardo and his wife in conjunction with psychological testing but also on those daily observations (and those of other staff members), reading the reports of the experts who testified in the *Daubert* hearings, and review of the neurologists' reports. The testing revealed unusual patterns that suggested to Dr. Denney, who has published in the field, that Eduardo was malingering, while the interviews revealed that Eduardo understood a great deal about his prior business dealings. The daily observations are particularly significant. Eduardo revealed several times in conversation that his memory was more intact than an incompetent person's would be. For instance, he remembered the intake nurse's name several days after that brief meeting and where Dr. Denney had vacationed almost

two weeks after it occurred. However, at the same time, Eduardo claimed not to know his address, birth date or clothing size, facts that dementia patients typically lose last. This type of observation of the whole person was not available to the other evaluating psychologists. In sum, Dr. Denney's evaluation was far more comprehensive and extensive than any of the other experts' and the district court did not err in crediting it.

The district court also had, by the time of the second competency hearing, observed Eduardo at trial and his interactions with his attorneys. Although Eduardo's attorney testified that Eduardo was incompetent, the court noted that the same attorney had earlier argued Eduardo was competent and only changed his assessment after Dr. Duara's email. Such an abrupt reversal understandably undermines the attorney's persuasiveness on this issue.

In conclusion, we hold that the district court did not commit clear error when it determined that Eduardo was competent to stand trial. The court thoroughly evaluated the evidence, listened to the experts' opinions, and provided persuasive reasoning for crediting Dr. Denney's opinion.

## III. CONCLUSION

We affirm Eduardo's, Hector's, and Puerto's convictions. We also affirm Puerto's and Hector's sentences.[FN17]

AFFIRMED.

FN* Honorable Sandra Day O'Connor, Associate Justice (Retired) of the United States Supreme Court, sitting by designation.

FN1. Specifically, Appellants were indicted under 18 U.S.C. § 371, 18 U.S.C § 2, 18 U.S.C. § 1344, 18 U.S.C. § 1343, and 18 U.S.C. § 1956.

FN2. ES Bank and BCC were each 50% shareholders in Bankest.

FN3. To the extent that Hector argues that his conviction will not stand in light of *United States v. Santos*, 553 U.S. 507, 128 S.Ct. 2020, 170 L.Ed.2d 912 (2008), we rejected that argument in *United States v. Demarest*, 570 F.3d 1232, 1242 (11th Cir.2009). There, we stated that "*Santos* has limited precedential value. Three parts of Justice Scalia's four-part opinion are for a plurality of justices, and those

parts do not state a rule for this case.... The narrow holding in Santos, at most, was that the gross receipts of an unlicensed gambling operation were not 'proceeds' under section 1956 ."*Id.* Because Hector was not convicted of operating an unlicensed gambling operation, *Santos* does not apply. *See also United States v. Jennings,* 599 F.3d 1241 (11th Cir.2010) (applying *Demarest's* analysis of *Santos* in a mail and wire fraud case).

Moreover, Hector made no such argument in the district court; therefore, his argument is subject to plain error analysis. Even if *Santos* applied in a bank and wire fraud context, as here, Hector could not satisfy the third and fourth prongs of the plain error analysis. The third prong is "the error must have affected the appellant's substantial rights, which in the ordinary case means he must demonstrate that it affected the outcome of the district court's proceedings." *Puckett v. United States,* ---U.S. ----, 129 S.Ct. 1423, 1429, 173 L.Ed.2d 266 (2009) (internal quotations omitted). Unlike the situation in *Santos,* Hector has not shown that the transactions underlying his money laundering convictions involved paying expenses of the fraudulent business; thus, even if *Santos* principles were applicable, Hector has not shown that the transactions would not be "proceeds." In other words, Hector has not shown that the outcome in the

district court would have been different. And, with respect to plain error's fourth prong, it is clear that fairness, integrity or public reputation of the judicial proceedings would not prompt an appellate court to exercise discretion in favor of Hector in this regard.

FN4. Fed.R.Evid. 804(b)(3) provides:

(3) Statement against interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

FN5. The only exculpatory evidence to which Puerto points in her brief on appeal is the "critical portions of their FBI statements which stated that they never thought the Orlanskys were doing fraud." Puerto's Brief at 39. Thus, the only exculpatory evidence identified by Puerto was not against interest and was not

properly admissible even in a separate trial.

FN6. We also reject Puerto's argument that the evidence could admitted under Fed.R.Evid. 807, the residual hearsay exception. Under that rule, hearsay evidence not fitting under Rule 803 or 804 but "having equivalent circumstantial guarantees of trustworthiness" is admissible. However, the statements here are not worthy of trust because of their very nature as exculpatory statements. *See Williamson v. United States*, 512 U.S. 594, 600-01, 114 S.Ct. 2431, 1435, ---L.Ed.2d ----, ---- - ---- (1994) ("Self-exculpatory statements are exactly the ones which people are most likely to make even when they are false"). Therefore, we reject Puerto's alternative rationale for admission of the statements.

FN7. To the extent that Puerto argued for the first time at oral argument that other aspects of the FBI statements were against interest, therefore were admissible, and rose to the level of the requisite prejudice mandating severance, we decline to address such belated argument. Moreover, we believe any such evidence was both cumulative of evidence actually presented to the jury and also of minimal probative value.

FN8. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993).

FN9. The distinction mentioned in the case law between psychiatric evidence that negates specific intent, on the one hand, and psychiatric evidence that a defendant does not have the capacity to form specific intent, on the other hand, is not relevant in this case. *See Westcott*, 83 F.3d at 1358; *Cameron*, 907 F.2d at 1066-67; *see also United States v. Pohlot*, 827 F.2d 889, 903-05 (3d Cir.1987).

FN10. Furthermore, one of the Government's experts, Dr. David Fishbain, reviewed Eduardo's business writing, correspondence and notes made from 1996 to 2003 and discerned no signs of mental or cognitive deterioration. Additionally, Dr. Fishbain noted that Eduardo made no complaints about forgetfulness, anxiety or being upset to his primary care physician until late 2004, after he was being treated by Dr. Gelblum and after he had been indicted.

FN11. Eduardo moved again mid-trial seeking reconsideration of the district court's decision to exclude the testimony of the doctors. Eduardo relied on the trial testimony of employee and co-conspirator Mendez about Eduardo's behavior during the relevant time, to wit: that some of Eduardo's business decisions made no sense; that he had trouble understanding financial documents; that he had memory problems; and

that he engaged in some ritualistic behaviors. The FBI statement of another employee also reported ritualistic behaviors, like repeatedly putting out his cigarette by pressing it against the bottom of the ashtray for an inordinate amount of time. Eduardo did not proffer sworn testimony of either doctor to the effect that the new evidence would permit them to testify with any degree of medical certainty as to Eduardo's state of mind as of the relevant time period. However, Eduardo did proffer brief emails from the two doctors. The district court concluded that the emails were "conclusory and provide little to no basis for the opinions offered." We have considered the testimony of Mendez and the statement of the other employee as well as the emails. We cannot conclude that the district court abused its discretion. The emails are conclusory; they fail to explain how the actions described would indicate either the timing or the degree of any cognitive impairment. Moreover, especially in the absence of expert testimony, we doubt that the behaviors described could indicate cognitive impairment to a degree that mens rea would be negated. For example, the most significant behaviors-poor business judgment and trouble understanding financial documents-would not seem to indicate cognitive impairment to the extent that a person would not realize that it is wrong to fabricate accounts receivable in order to mislead one's lender and joint venture partner. In any event, in the absence of expert testimony to that effect, we cannot conclude that the district court

abused its discretion. We also note that after his indictment, Eduardo's own doctors initially opined that Eduardo was competent to stand trial.

FN12. In addition to the hearings the district court held on the evidence of Eduardo's mental state, it held a four-day hearing on the related issue of Eduardo's competency before trial began and ordered both an in-patient evaluation and an independent expert evaluation of Eduardo's competency. Moreover, as discussed below, the court re-examined Eduardo's competency both during the trial and after it, producing detailed analyses of the experts' testimony and demonstrating an extensive understanding of Eduardo's mental condition.

FN13. We noted above in Part II.F.1 that Eduardo sought to introduce the testimony of the two doctors for three purposes: first, to support his insanity defense; second, to negate mens rea; and third, to support his claim that he had been kept in the dark about the fraud. The district court's opinions, and our own opinion in the text above, specifically address the issue only with respect to its use to support the insanity defense, and to negate mens rea. However, the same rationale applies with equal force to Eduardo's attempt to use the evidence to support his claim that he had been kept in the dark about the fraud. We can assume arguendo,

but we expressly do not decide, that the IDRA would not present an absolute bar to the use of psychiatric evidence for this third purpose. However, even assuming that, it is clear that the IDRA would require that the evidence be focused on defendant' state of mind at the time of the crime. Because the evidence of the two doctors was not thus focused, the district court did not abuse its discretion in implicitly holding that the IDRA renders the evidence inadmissible for this third purpose also.

FN14. The district court also properly rejected, on the basis of *Daubert,* Eduardo's third rationale for admitting the expert witness testimony about his mental state-to show that he was easily influenced by his employees-because of the experts' inability to testify with any medical certainty about his mental state during the relevant time period.

FN15. In light of our decision that the district court did not abuse its discretion in excluding the testimony of the two doctors on the basis of the IDRA and Rule 702, we need not address the district court's alternative ground, Fed.R.Evid. 403.

FN16. In *Bonner v. City of Prichard,* 661 F.2d 1206, 1209 (11th Cir.1981)(en banc), this Court adopted as binding precedent all of the decisions

of the former Fifth Circuit handed down prior to the close of business on September 30, 1981.

FN17. The district judge is to be commended for his superb handling of this case, especially his careful consideration of the mental health issues.

C.A.11 (Fla.),2010.
U.S. v. Puerto
Slip Copy, 2010 WL 3191765 (C.A.11 (Fla.))

United States District Court
Southern District of Florida

MIAMI DIVISION

UNITED STATES OF AMERICA

JUDGMENT IN A CRIMINAL CASE
Case Number: 03-20951-CR-JORDAN

v.

ARIADNA SOFIA PUERTO

USM Number: 63441-004
Counsel For Defendant: Michael Zelman, Esq.
Counsel For The United States: Caroline Heck Miller
Court Reporter: Lisa Edwards

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The defendant was found guilty on Count(s) 1, 11 through 24, 31, 32, 37, 38, 42 and 44 of the Superseding Indictment.
The defendant is adjudicated guilty of the following offense(s):

| TITLE/ SECTION NUMBER | NATURE OF OFFENSE | OFFENSE ENDED | COUNT |
|---|---|---|---|
| 18 U.S.C. §1349 | Conspiracy to commit bank and wire fraud | August 2003 | 1 |
| 18 U.S.C. §1344 | Bank fraud | May 6, 2002 | 11 - 17 and 20 - 24 |
| 18 U.S.C. §1344 | Bank fraud | February 8, 2001 | 18 and 19 |
| 18 U.S.C. §1343 | Wire fraud | July 5, 2002 | 31, 32, 37 and 38 |
| 18 U.S.C. §1956(a)(1)(A)(I) | Money laundering | March 13, 2002 | 42 |
| 18 U.S.C. §1956(a)(1)(A)(I) | Money laundering | April 29, 2002 | 44 |

The defendant is sentenced as provided in the following pages of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any

change of name, residence, or mailing address until all fines, restitution, costs and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of any material changes in economic circumstances.

Date of Imposition of Sentence:

8/10/2007

ADALBERTO JORDAN
United States District Judge

## IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of **84 Months as to Counts 1, 11 through 24, 31, 32, 37, 38, 42 and 44, to be served concurrently**.

The Court makes the following recommendations to the Bureau of Prisons:

1. That the defendant be designated to Coleman, Florida or an institution in the State of Florida.

The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons **before 2:00 P.M. on October 12, 2007.**

## RETURN

I have executed this judgment as follows:

_____

_____

Defendant delivered on _____ to _____

at _____,

with a certified copy of this judgment.

_____

UNITED STATES MARSHAL

By:_____

Deputy U.S. Marshal

## SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **3 years as to Counts 1, 11 through 24, 31, 32, 37, 38, 42 and 44, to run concurrently**.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

**The defendant shall not possess a firearm, destructive device, or any other dangerous weapon.**

If this judgment imposes a fine or a restitution obligation, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as any additional conditions on the attached page.

## STANDARD CONDITIONS OF SUPERVISION

1. The defendant shall not leave the judicial district without the permission of the court or probation officer;
2. The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;
3. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4. The defendant shall support his or her dependents and meet other family responsibilities;
5. The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
6. The defendant shall notify the probation officer **at least ten (10) days prior** to any change in residence or employment;
7. The defendant shall refrain from the excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9. The defendant shall not associate with any persons engaged in criminal activity, and shall

not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;
11. The defendant shall notify the probation officer within **seventy-two (72) hours** of being arrested or questioned by a law enforcement officer;
12. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;
13. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

## SPECIAL CONDITIONS OF SUPERVISION

The defendant shall also comply with the following additional conditions of supervised release:

The defendant shall provide complete access to financial information, including disclosure of all business and personal finances, to the U.S. Probation Officer.

## CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the Schedule of Payments.

| Total Assessment | Total Fine | Total Restitution |
|---|---|---|
| **$2,100.00** | $ 0 | **$164,597,310.11** |

Restitution with Imprisonment -
It is further ordered that the defendant shall pay joint and several restitution in the amount of $164,597,310.11. During the period of incarceration, payment shall be made as follows: (1) if the defendant earns wages in a Federal Prison Industries (UNICOR) job, then the defendant must pay 50% of wages earned toward the financial obligations imposed by this Judgment in a Criminal Case; (2) if the defendant does not work in a UNICOR job, then the defendant must pay $25.00 per quarter toward the financial obligations imposed in this order.

Upon release of incarceration, the defendant shall pay restitution at the rate of 10% of monthly gross earnings, until such time as the court may alter that payment schedule in the interests of justice. The U.S. Bureau of Prisons, U.S. Probation Office and U.S. Attorney's Office shall monitor the payment of restitution and report to the court any material change in the defendant's ability to pay. These payments do not preclude the government from using other assets or income of the defendant to satisfy the restitution obligations.

The defendant shall make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(I), all nonfederal victims must be paid before the United States is paid.

| **Name of Payee** | **Total Amount of Loss** | **Amount of Restitution Ordered** | **Priority Order or Percentage of Payment** |
|---|---|---|---|

| | | |
|---|---|---|
| ESB Finance Ltd. Grand Pavillion West Bay Road P.O. Box 10507 APO Grand Cayman Cayman Islands, BWI | $ | $164,597,31 0.11 |

*Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18, United States Code, for offenses committed on or after September 13, 1994, but before April 23, 1996.

## SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A. Lump sum payment of **$2,100.00** due immediately.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

**The assessment/fine/restitution is payable to the CLERK, UNITED STATES COURTS and is to be addressed to:**

**U.S. CLERK'S OFFICE**
**ATTN: FINANCIAL SECTION**
**301 N. MIAMI AVENUE, ROOM 150**
**MIAMI, FLORIDA 33128**

**The assessment/fine/restitution is payable immediately. The U.S. Bureau of Prisons, U.S. Probation Office and the U.S. Attorney's Office are responsible for the enforcement of this order.**

Joint and Several

Defendant Name, Case Number, and Joint and Several Amount:

All Co-Defendants in Case No. 03-20951-CR-JORDAN, $164,597,310.11

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) community restitution, (6) fine interest (7) penalties, and (8) costs, including cost of prosecution and court costs.